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APPENDIX

In the Supreme Court of the United States

TERM, 1974

73-7031

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED JULY 19, 1974
CERTIORARI GRANTED OCTOBER 29, 1974

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INDEX

	Page
Chronology	1
Record on Appeal from the Supreme Court of North Carolina	3
Complaint for Arrest, July 1, 1973	3
Indictment, July 30, 1973	4
Arraignment, September 24, 1973	4
Verdict, September 26, 1973	5
Judgment and Commitment, September 27, 1973	5
Sentence, September 27, 1973	6
Statement of Case on Appeal	7
State's Evidence	8
Testimony of Mrs. Mary Raines	
Direct	8
Cross	10
Testimony of Mr. Johnny Frazier Dolby	
Direct	13
Cross	15
Testimony of Mr. Charles McCoy	
Direct	18
Cross	20
Testimony of Sgt. Kenneth Johnson	
Direct	22
Cross	23
Testimony of Dr. Laurin K. Kaasa	
Direct	25
Cross	27

503-836—74——1

Record on appeal from the Supreme Court of North Carolina—Continued

State's Evidence—Continued

	Page
Testimony of Detective D. C. Williams	
Direct	27
Cross	30
Testimony of Ms. Jonice Marlene Griffin	
Direct	31
Cross	31
Testimony of Ms. Paula Griffin	
Direct	32
Cross	33
Defendant's Evidence	34
Testimony of Mr. Connie "Doc" Holliday	
Direct	34
Cross	36
Redirect	37
Testimony of Mr. Sylvester Jones	
Direct	37
Cross	40
Redirect	42
Testimony of Mrs. Vasti Fowler	
Direct	42
Testimony of Ms. Doris Marie Clacks	
Direct	45
Cross	45
Testimony of Mr. James McIntosh	
Direct	45
Cross	46
Testimony of Mr. Charles Gene Rogers	
Direct	46
Cross	47
Testimony of Mr. Johnny Fraizer Dolby	
Direct	47
Testimony of Mr. Jesse Thurman Fowler	
Direct	50
Cross	61
Redirect	66
Testimony of Rev. Robert Talley	
Direct	67
Testimony of Mr. Robert C. Monroe	
Direct	68
Charge to the Jury	69
Verdict, September 26, 1973	84
Judgment, September 27, 1973	86
Grouping of Exceptions and Assignments of Error	88
Opinion of the Supreme Court of North Carolina, Moore, J. for the Court (Bobbitt CJ, Higgins & Sharp, JJ, dissenting), dated April 10, 1974	88
Judgment of the Supreme Court of North Carolina, dated April 22, 1974	104
Order granting motion for leave to proceed *in forma pauperis* and granting petition for writ of certiorari	105

CHRONOLOGY

July 1, 1973: Complaint filed charging that petitioner "on or about the 1 day of July, 1973, . . . , did unlawfully, wilfully, and feloniously and of his malice aforethought kill and murder John Griffin."

July 10, 1973: Preliminary Hearing in district court held, probable cause found, and petitioner bound over to Superior Court.

July 30, 1973: Grand jury returned true bill indicting petitioner for the murder of John Griffin.

September 24, 1973: Petitioner arraigned and pleaded "not guilty;" jury selected and empaneled for petitioner's trial.

September 25, 1973: Petitioner's motion for judgment as of nonsuit* denied at close of State's evidence; this motion renewed and denied at close of petitioner's evidence.

September 26, 1973: Jury instructed that it may find petitioner not guilty, guilty of manslaughter, guilty of murder in the second degree, or murder in the first degree. After deliberation, jury returned verdict of guilty of murder in the first degree. Petitioner's motion to set aside the verdict as being contrary to the evidence denied.

September 27, 1973: Petitioner's motion in arrest of judgment denied. Judgment, Commitment, and Sentence entered, sentencing petitioner to be executed "by inhal[ing] lethal gas." Petitioner filed Notice of Appeal to North Carolina Supreme Court.

April 10, 1974: Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting.

April 17, 1974: Mr. Chief Justice Bobbitt of the North Carolina Supreme Court issued a stay of execution "pending further orders of this court" to enable petitioner to file a petition for certiorari in the Supreme Court of the United States.

July 9, 1974: Petition for certiorari and motion to proceed *in forma pauperis* filed in Supreme Court of the United States.

October 29, 1974: Petition for certiorari and motion to proceed *in forma pauperis* granted.

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*The motion for judgment as of nonsuit is the same as a motion for a directed verdict of not guilty, or a motion for an involuntary dismissal. N.C. Gen. Stat. § 15-173 (1965); *State* v. *Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969).

[ROA 2]* WARRANT No. 73CR41907

IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION,
STATE OF NORTH CAROLINA, COUNTY OF WAKE

THE STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER

COMPLAINT FOR ARREST, MURDER

Age 24, Race N, Sex M
1817 Liberty Place, Raleigh

The undersigned, W. L. Baker, being duly sworn, complains and says that at and in the County named above and on or about the 1 day of July, 1973, the defendant named above did unlawfully, wilfully, and feloniously and of his malice aforethought kill and murder John Griffin.

The offense charged here was committed against the peace and dignity of the State and in violation of law GS 14–17.

(S) WILLIAM L. BAKER.
Complainant.

[ROA 3] Sworn to and subscribed before me this 1 day of July, 1973.

(S) H. R. BROWN,
Magistrate.

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*"ROA" stands for "Record on Appeal", and the subsequent numeral indicates the page at which a particular item is found in the printed Record on Appeal in the Supreme Court of North Carolina.

[ROA 4] INDICTMENT—MURDER—No. 73CR41907

IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION,
STATE OF NORTH CAROLINA, COUNTY OF WAKE

(2nd July Crim. "R" Session, 1973)

THE STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER, DEFENDANT

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Jesse Thurman Fowler, late of the County of Wake on the 1st day of July, 1973, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder one John Griffin contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State, G.S. 14–17.

(s) BURLEY B. MITCHELL, JR.,
Solicitor.

[ROA 5] WITNESSES:

X Johnny Dolby
X Jonsie Griffin
X Paula Griffin
D. C. Williams (RPD)
Charles McCoy

Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found—A True Bill.

(s) WILLIAM T. BAREFOOT,
Foreman Grand Jury.

[ROA 5] ARRAIGNMENT OF PRISONER

AND NOW the defendant the said Jesse Thurman Fowler being brought to the Bar of the Court by Robert J. Pleasants, Sheriff of Wake County in whose custody he is and forthwith it being demanded by the Court that all persons remain silent upon penalty, and the said Jesse Thurman Fowler being then and there present and represented by Counsel John Brooks, Esq., the Bill of Indictment heretofore set out is read to him

and forthwith it being demanded of him how he will acquit himself of the premises in the said Bill of Indictment specified and charged upon him, he saith he is not guilty thereof and for good and for evil he puts himself upon God and his Country. And therefore, let a jury be drawn of good and lawful men by whom the truth of the matter may be better known.

And the defendant, the said Jesse Thurman Fowler is remanded to the custody of the Sheriff.

This the 24th day of September, 1973.

(S) HENRY A. MCKINNON, JR.,
Judge Presiding.

[ROA 9] VERDICT

The jury, after deliberation, returned into open Court with the following verdict as returned by their foreman:

"We find the defendant guilty of murder in the first degree as charged."

Upon motion of the defendant through counsel, the jury was duly polled, each juror answering to their name individually and each assenting to the verdict of guilty of murder in the first degree as charged, as returned by their foreman.

This 26th day of September, 1973.

(S) HENRY A. MCKINNON, JR.,
Judge Presiding.

To the foregoing Verdict, defendant objects and excepts. Exception No. 2.

[ROA 9] JUDGMENT AND COMMITMENT

In open court, the defendant appeared for trial upon the charge of murder in the first degree and was arraigned as appears of record and thereupon entered a plea of not guilty. A jury was selected and empaneled and heard evidence for the State and for the defendant, and after deliberation returned as its verdict that the defendant was guilty of murder in the first degree as charged.

He having been found guilty of the offense of murder in the first degree as charged, which is a violation of G.S. 14–17 and of the grade of capital felony. The defendant was given the opportunity to be heard before judgment

[ROA 10] It is ADJUDGED that the defendant be remanded to the Common Jail of Wake County and there remain until the adjournment of this Court, and that he be conveyed by the High Sheriff of Wake County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and

It is FURTHER ORDERED and ADJUDGED and DECREED that he remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that he be taken by the said Warden to the place provided for execution in said prison; and

It is FURTHER ORDERED and ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take him the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause him to inhale lethal gas of sufficient quantity to cause death to be administered to him and to continue said inhaling of said lethal gas by him until his death.

It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This the 27th day of September, 1973.

(s) HENRY A. McKINNON, Jr.
Judge Presiding.

[ROA 11] Attorney for Defendant: John Brooks
Attorney for State: Joseph A. Calder

Date certified copies of judgment delivered to Sheriff for commitment: 10-1-73

To the foregoing Judgment, the defendant objects and excepts.

Exception No. 3.

[ROA 11] SENTENCE

Jesse Thurman Fowler, you have been indicted, tried and convicted by a jury of your county of the murder in the first degree of one John Griffin. The law prescribes in Section 14-17

of the General Statutes of North Carolina that the punishment for your crime is death. The judgment of the Court therefore is that you be remanded to the Common Jail of Wake County and there remain until the adjournment of this Court.

IT IS ORDERED that you be conveyed by the High Sheriff of Wake County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and IT IS FURTHER ORDERED AND ADJUDGED AND DECREED that you remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that you be taken by the said Warden to the place provided for execution in said prison; and IT IS FURTHER ORDERED AND ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take you the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause you to

[ROA 12] inhale lethal gas of sufficient quantity to cause death to be administered to you and to continue said inhaling of said lethal gas by you until your death.

This the 27th day of September, 1973.

Signed HENRY A. McKINNON, Jr.
Judge Presiding.

To the foregoing Sentence, the defendant objects and excepts.

Exception No. 4.

[ROA 14] STATEMENT OF THE CASE ON APPEAL

The defendant, Jesse Thurman Fowler, was arrested on or about July 2, 1973 and charged in a warrant with first degree murder. A true bill of indictment was returned by the Wake County Grand Jury during the second July, 1973 Regular Criminal Session of Court.

The case came on to be heard in the Superior Court of Wake County on September 24, 1973. The defendant entered a plea of not guilty and was tried before a jury. The jury returned a verdict of guilty of first degree murder.

Exception No. 5.

Thereupon, the Court, the Honorable Henry A. McKinnon, Jr., Judge presiding, pronounced judgment and sentenced the defendant to death.

Exception No. 6.

Upon the entry of the judgment and pronouncement of sentence, the defendant in open court gave notice of appeal.

The Honorable Joseph A. Calder appeared for the State. The defendant was represented by the Honorable John Brooks.

[ROA 16] STATE'S EVIDENCE[1]

COURT: You may call your first witness.

Mrs. Mary Raines, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

My name is Mary Raines. I live in an apartment at 1300 Branch Street, Raleigh, North Carolina. My son and I have lived there for a year. He is seventeen. I know John Griffin. I have known him since he was a small boy, but I hadn't seen very much of him for the last four or five years but I seen him that particular day, which was the first day of July.

I know Mrs. Christene Hall. She lived down the street from me—about two blocks, I guess.

Yes, sir. I know the two smaller children but I didn't know their names. I knew that John Griffin and Christene Hall were at one time husband and wife. I used to meet them at the Parent-Teachers meetings and that is where I met the wife and the children. I saw the children on the first of July. They were with their daddy right across in front of my house. I was sitting on my front steps at that time. My next door neighbor's little girl and another boy, William Allen, were sitting there with me.

I spoke to John Griffin when he was out in front of my house for about 30 minutes. Well, we was talking about the children and how I used to give him nickels and dimes when he was smaller. No special thing. And he said that he was sick and he was going back to the Veterans' Hospital the next week. His baby girl was trying to get some money from him.

[ROA 17] Q. While John and the two girls were out in front of your house, did a car come driving up?

A. I don't know when that car came up over there. When I noticed the car was across the street from my

[1] Rule 19(4) of the Supreme Court of North Carolina provides that "[t]he evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception." The Court is familiar with the North Carolina practice of "narrating" the transcript on appeal. *Bumper v. North Carolina*, 391 U.S. 543, 546 n. 8 (1968).

house on the other side of the street and there were two men in the car. I didn't know those two men because I thought they were his friends. One of them called him and told him to come here, John. He went over there and just turned after he said something—"I am tired of you all bugging me," and he come right on back to the children and squatted down on the sidewalk. Well, when I looked again, the car was gone.

John still stayed out there with the children and I asked him what the little girl wanted. He said "Money," and I said, "Give it to them." And he said that they better go back home to their mama and the larger girl started on back and the little one started standing and he started behind her like he was going to make her run on back home. She walked on off and a few minutes this fellow come running from that direction, the way they, the children were going, and ran up the bank to my steps in the street and began to shoot John in front of my eyes and I couldn't even get up. There was another man coming up the street. I don't know if that is he sitting there.

The man with the gun came from the same direction that the children had gone. I did not hear him say anything. I did not hear John say anything to him. I did not hear the third man say anything. When he shot John, the little girl was nowhere from him, not far. Just a little step away.

The gun was fired twice I know and then I heard the gun say "Click, click," and it must wouldn't do it no more. The

[ROA 18] man that was shooting ran back down the street the same way he come, but he was up on the sidewalk this time and the first time he was down on this little small walk. The sidewalk is up higher than the street level. John, he kind of stood up like that and he found out he couldn't walk and he got down like this and rolled to my doorstep and took hold of the side of the porch and walked up an took hold of my screen door and turned around and I asked him, "Did that man shoot you?" He said, "Yes, two times in my stomach and in my leg."

I was still hollering right on. He said, "Call my mama and call an ambulance." I said, "All right." But I never did. I kept hollering until I got a whole crowd there and I sent somebody in there to call his mother and the police. The police come and then the ambulance come. And the pillow I was sitting on, I took, raised his head up and put it under his head like that, but I was so nervous I couldn't hold it. Somebody else did take it and hold it for me.

Q. All right. Were you able to recognize the man that was shooting out there?

A. I didn't pay him but a very little attention. He looked like he was kind of a brown-skinned fellow. He turned this way and I am sitting over here on the porch and he was shooting that way at John. I wouldn't have known him if he had come back. I hadn't seen him before. I do not know who was driving the car that I had seen.

Afterwards, I did not see him throw any gun down. I just saw him run back down that way. It took the police about five or ten minutes to get there, I reckon. The law come earlier than the ambulance did. The ambulance come and got him. There was a hundred people there in a few minutes.

Q. Was John still conscious when the
[ROA 19] ambulance got there?

A. Well, that was the last thing he said to me when he asked me to call his mama and the ambulance. Before he said that, he told me the man had shot him two times.

He didn't bleed a drop at my porch. Not even one drop. I ain't seen a drop of blood. So he must have been bleeding inward. During the time he was waiting for the ambulance, he was laying on my porch with his head on the steps. He wasn't able to stand up.

Q. What happened to the children?

A. Their mama came up the street, I reckon. I don't know who told her but the mama come up the street and got the children. One of them just fell out there. The oldest one, I think. They carried them on back home around the corner.

Mr. CALDER. I believe that is all the questions I have.

Cross Examination by BROOKS:

John's two children were with him. Sitting with me was a little girl named Cathy and Mrs. Annie Lee Allen's boy when the first shot was fired but the other girl was sitting on this side of me minutes before the first shot was fired. So she didn't see it. I first saw John after he come out there in the street and I was sitting there trying to write a letter. I was sitting on the steps. My apartment is on Branch Street right where you turn in off Holman Street. It's the first house right on the corner. There's a big vacant lot right between me and Holman Street.

Q. Was John still talking with you at the time the car of which you speak approached the intersection of Holman and Branch Streets?

A. After he spoke with the men in the car,
[ROA 20] I don't know when the car left because I just thought it was his friend. I didn't pay it no attention. At the time that car first appeared John Griffin was right in front of the house on the sidewalk with the children.

Q. Were there other people sitting out in the yards and on porches?

A. I didn't pay no attention because the little girl from the next door was with me and this other boy from around the corner. They was children and things across the street but I don't think there was any right around me. I don't know Charles McCoy by name. I had known John Griffin since he was a small boy. I don't know how old he was.

COURT. Could you give us your best estimate about how old he was?

A. He might have been around 25 or 30, I reckon. I can't say for sure. Recognizing that I hadn't seen him for about five years, I didn't know about his general conduct. No, I never heard he had been in prison.

Q. Have you ever seen the defendant sitting here with me before?

A. Not before today. Not in his face to look at him.

Q. And you indicated that you were aware of a car stopping in front of your house?

A. Well, the car—I wouldn't have paid it no attention if they hadn't called John to the car. The little girls at that time were still standing there on the sidewalk. I was told that the little girls, that they were John's. They lived with their mother. No, I don't think John Griffin and his wife were living together. The mother lives in my neighborhood off Walnut Terrace, about two blocks from around the corner. She has been over there four years and I have been over there a year. I lived on Battle Street.

They tore my house down. I don't know
[ROA 21] where John lived.

Q. Now after this car stopped and you indicated it drove off again, was that within seconds of the time it stopped?

A. I don't know when it come up there and I don't know when it left. From the time they called him to the car and the shooting I reckon it was about five or ten minutes.

Q. But I believe you indicated that you asked John did that man shoot you?

A. That's right. He was at my steps right by me.

Q. Then you did not see the man shoot that boy?

A. Yes, sir, I did see that man shoot that boy.

Q. But you did ask John did that man shoot you?

A. That is how crazy I was. I was tore all to pieces. I saw the man shoot John. The person whom I observed shooting John ran back toward the schoolhouse. At the time I saw the car it was headed that—toward Highway 401. Yes, it was headed that way. I don't know which way the car went because I don't know when it left. The person I saw running up to John come from the direction of Highway 401, the way the car was headed, which I didn't see the car go.

After the shooting, the person who had done the shooting went back toward the east, toward Highway 401. Griffin at the time of the shooting was up there on the sidewalk. Well, it wasn't right in front of my house; it was towards the east of my house. I had not seen John go in that direction. John was just trying to get the little girl home. He was, you know, patting on behind her. The two little girls live to the east of my house, about two blocks. The person whom I saw shoot John had a gun. He had it already out in his hand and doing just like that. I don't know what kind of gun it
[ROA 22] was. It was a pistol. I saw John at the time of the shooting. I was sitting on the steps. He had nothing in his hand. The person who had done the shooting just ran out down the street. He had the pistol still the last time I saw him. I stayed outside after the shooting until it got dark, just hollering.

This occurred, I reckon, about 20 minutes before dark. When the police and ambulance arrived, it was not already dark. The police just told everybody to get back so the ambulance could get there and so the man could get some air. They just crowded up around him. They took him and went away and somebody called me back later and said John had died.

It had got dark then. Then the police come by all night for two or three hours. Someone called me at my home. I don't know who the boy was.

Mr. Brooks. No further questions of this witness, your Honor.

Johnny Frazier Dolby, being first duly sworn, testified as follows:

Direct examination by Mr. Calder:

My name is Johnny Frazier Dolby. I go to school at Hardbarger and I work at night at the Bus Garage at Carolina. I'm taking Business Administration at Hardbarger's. I have been out there about a month. Before that I was in service for two years and a couple of months. I am not married. Mrs. Hall is my aunt. And Mrs. Hall was John Griffin's former wife.

Q. And did you know the girls Paula and Jonsie and Christine?

A. Since I got out of the service, I stay with
[ROA 23] Mrs. Hall and her children, Paula, Jonsie and Christine and Mr. Hall.

I know the defendant. I know him by the name Hucklebuck. That is his nickname. I have been knowing Jesse ever since '68. My family knows him real good but I didn't. I didn't stay in Raleigh that much. I got to be friends with him before I even joined the service.

I recall the incident that we are talking about, the first day of July, 1973. I think I was at Jesse's house that Friday night. I was over there. I think it was Friday night or the week before that one.

This afternoon there on Branch Street, Jesse Fowler was riding with me. I had picked him up on the corner of East and Lenoir Street, I think. It is on the other side of Highway 401. We rode together about five or eight minutes before we got over to Branch Street. I did not see him at any time that day before right then. I had been sleeping all day. I did notice something unusual about Jesse's appearance when I picked him up. I saw some blood on his T-shirt, and I asked him, "What is your T-shirt doing bloody?" I was laughing about it. He said he and John Emory got in a fight.

Q. Did you know what John he was talking about?

A. He called John Griffin's name out. No, he didn't tell me what they were fighting about. He did not say when and where they had been fighting. He did not say anything else about the fight.

I drove on over; I stopped the car near Branch and Holman Streets.

Mr. Brooks. Objection.

Court. Don't lead him.

As I was turning off Holman Street, I was
[ROA 24] going to Branch Street and John came toward the car and I stopped. John snatched the door of the car open.

Q. And what happened then?

A. And I told him, "Don't snatch the car door open no more," and he shut the car door and he told me—he told Huck, he said, "I don't want to fight you no more. I want you to go on home," and Huck told me to take him on home and I said, "Okay," and I drove off and then I got down a couple of yards. Huck told me to let him out. I said I am going to take you home. He said, "No, let me out." I stopped the car and when he got out, I drove off. I went on home.

Q. Did he say for you to leave?

A. He didn't say nothing. I just drove on off. After he got out of the car, he went in the opposite direction I was going in. I was going toward 401 East and he was going back toward the other way. I could not see John at the time Jesse got out of the car. I didn't even look back. I just kept on driving. I went around to my aunt's house. She lives on Branch Street, too, but you have to go around the corner to get there. I told my aunt to go around there and get Ringaling and Tootsie. That is their nicknames.

COURT. For the children?

Jonsie and Paula. Those are their nicknames. I told her to go and get them because Huck went back down toward John and so I just stayed out in the yard and that is all. She started to leave, but she came on back because Jonsie came back around to the house. Jonsie is the oldest one of the two. I had seen Jonsie and Paula down there with their daddy.

I didn't go down there to where the shooting had occurred afterward. I sat in the yard and I saw Jesse going on top of the
hill. It is not exactly a hill. Between the apart-
[ROA 25] ment house and the trash can. He cut between there and I hollered at him and he throwed his hand up and kept on walking. He did not go up to the highway. I didn't see him anymore. They took me down to the police station and asked me a whole lot of questions. They turned me aloose down there about 11:00 o'clock that night. I had not been at Sylvester Jones' house at any time during that day.

Q. Had Jesse been drinking—could you tell?

A. Yes, sir.

Q. How could you tell?

A. His eyes were red.

There was nothing unusual about the way he spoke to me. Yes, he could walk all right.

Q. Could you smell alcohol on his breath?

A. I wasn't that close to him. I didn't see any liquor with him. I did not see a gun. He did not say anything about a gun.

Jesse lives in South Gate. I don't know the house number. It is not over there on East and Lenoir Streets.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. BROOKS:

I live at 1338 Branch Street. It is a straight street. Not a one-way street. It does have a curve in it. In some places—it does go east and west. Just goes east and west. That is all. My house faces north; it faces out toward 401 Highway.

Q. Which way does Highway 401 run?

Whether 401 Highway runs north and south
[ROA 26] or east and west, I don't know. Leaving Raleigh, 401 goes south, down toward Smithfield, Fayetteville, North Carolina. 401 runs beside Memorial Auditorium.

Q. All right, so 401 runs north and south?

A. Yes, sir. My house faces 401; that would be east, I think. The house where I live is connected to other houses. The area where I live, we used to call it for the war in Viet Nam.

Q. What proper name does it have?

A. Walnut Terrace. Walnut Terrace is primarily a group of apartments. I do not live in a corner apartment.

Q. Does Branch Street run parallel in the same direction that 401 runs in, except for the curve part?

A. Yes, it runs parallel, except the curve part. And in front of the house where I live, it runs north and south like 401. It also intersects into Holman Street. Holman Street runs north and south parallel to 401 also. It does run parallel to the part of Branch Street where I live. Branch Street runs into Holman Street at some point to form an intersection. Branch Street forms a 90 degree angle with Holman Street. The curve in Branch Street is a right angle curve.

Q. All right. So Branch Street runs both east and west and north and south, is that correct?

A. I don't know nothing about the directions.

I picked up the defendant, whom I call Hucklebuck, at the corner of East and Lenoir Street.

Q. What is your estimate about the time that it was?

A. Could have been about 6:30 or 7:00 o'clock, in the afternoon. The defendant waved me down. He told me to give him a ride to Walnut Terrace. He did not
[ROA 27] tell me why he wanted to go to Walnut Terrace. There was blood on his shirt. I didn't pay too much attention to whether that blood was dry or stained. I was headed home. He told me to give him a ride to the Terrace and that is all.

On July the first, 1973, I went to bed about 7:30 or 8:00 o'clock that Sunday morning. I got up about 4:30 in the afternoon. In the afternoon, I got up and then I ate and then I laid back across the bed. I was feeling bad. Yes, sir, I told defendant that I had been in bed and told him I was going back home and go to bed. When he got in my car, I gave him a cigarette. I have known defendant rather continuously since 1968; I stayed with him in Washington, D.C., in 1969—during the summer. I stayed with him until about a year or so. I know about defendant's general conduct. To me, it was general good conduct. John Griffin visited the defendant and stayed with him at Washington, D.C. Jesse got John and my brother a job up there with Hillside Terrace at 23rd Street, Southeast. I had came back home. I don't know how long John stayed with the defendant in Washington, D.C. From my knowledge the defendant and John Griffin were rather well acquainted. They partied together most of the time. I have known John Griffin ever since I can remember. I am twenty-two.

I do not know what year John Griffin married Mrs. Hall, his first wife.

Q. Do you know anthing—have you ever had an opportunity to observe John Griffin's conduct?

A. I have heard talk of his conduct but I ain't never been around John since he was older than I was.

Q. Do you know anything about his general
[ROA 28] reputation?

A. Some folks say John will knock you in the head if you turn your back. I never observed any of his conduct on my own.

When I went over to Walnut Terrace, I came down—it is Fayetteville Street. I turned left at Peacock's Store. I came to a stop sign, turned back right on Holman Street and then I turned back left off to go to Branch Street. At that point,

Branch Street deadends into Holman. But Holman Street continues across the intersection. At the time I turned left onto Branch, I saw John and his two children standing on the corner of Branch and Holman, to my right as I turned left. I think that's the south side of Branch; I am not too sure. They were standing on the sidewalk. They were not in front of any apartments. They were in front of a little acre or open space.

When I turned that corner, John come toward the car. Neither I nor the defendant called out to him. John Griffin did not call out to us. He came toward the car and I stopped. When I stopped John snatched the car door open and I told him, "Don't snatch the car door no more." He told Huck—said, "I don't want to fight you no more, man." He said, "Why don't you go on home." I don't know how he was saying it because everything John said, I usually don't pay no attention to it. I didn't take it seriously. That is about all he said. Huck didn't say nothing to John. Huck just sit there in the car and that is all. Then I drove about halfway between those departments. It could have been half a block and could have been less than that; could have been ten car lengths.

I heard something about the reputation of John and his general reputation. Yes, sir, when he started to drinking, John Griffin had a big month. I do not know whether he had been drinking that day. It sounded like he might have been.

[ROA 29] From where I stopped and where the defendant got out, my house was around the curve, about 20–25 car lengths. I had on a radio during the time I was driving along, including at the time I was stopped by the defendant. Between the time I picked up the defendant and the time I got home, I turned the radio up. At the time the defendant got out of my car, I was going toward the east, toward 401, which is the same direction my house faces. I had stopped just for a second.

Defendant got out of the car and got on the sidewalk and went back toward John, heading west. On July the first, 1973, I thought John Griffin was staying in Goldsboro but I saw him in Raleigh most of the time. John Griffin had remarried, I think.

I never been arrested for any offense. Up until I was sixteen, I stayed in a foster home in Knightdale. I knew the defendant about a year before I left the foster home.

Mrs. Hall has one child named Howard Griffin. Everybody calls him Skip. Skip is 18. Got one named Ray Griffin. Everybody call him Monkey. He is 15 or 16 I think. Then she got one named Red—Lon Griffin; everybody called him Red. Red about 15. I think. She got another one, Tingaling; her name is Jonsie Griffin. She is 11 or 12 one. And got one named Paula Griffin. She is nine. Everybody calls her Tootsie. That is five of them. They were living at Mrs. Hall's on July the first, 1973. On this July first, 1973, there won't none of them outside really. Nobody but Toctsie and Tingaling. (Jonsie/Paula). They were down there with their daddy. They could have been outside. There were so many people outside I wasn't paying no attention. When I stopped the car in the middle of that block, I did not see them again. I saw them again when they came back around to the house. This could have been about 20 minutes or 30 minutes after I had first seen them. It
[ROA 30] could have been less than that. When I saw them again, it was about—let me see, I call it dark. It won't [sic] that dark though.

I later saw defendant again going between the trash can and the other apartment, heading north.

Q. All right. And was he close to Highway 401?

A. I say about a couple of yards. That won't [sic] that close though. There are no buildings between where he was walking and Highway 401. He throwed his hand up like that and walked on away. He was walking when I saw him. He wasn't running at all. At the time I yelled to him, I had not heard whether or not there had been anybody shot on Branch Street. He got out of sight and I heard about it then.

At the time John Griffin first had the car door open talking to the defendant, I think I heard everything that he said. John shut the car door. I was not moving at the time the car door was shut.

Mr. BROOKS. No further questions of this witness, your Honor.

(Witness excused.)

Charles McCoy, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Charles McCoy is my name. I live in the Walnut Terrace neighborhood. I was near the corner of Branch and Holman Streets on the first day of July close to dark. I know where Mary Raines lives. I was near her house on my way home.

I was coming from the west—from the basket-
[ROA 31] ball court. I came up Holman Street to Branch and went left or east on Branch. I knew John Griffin at that time and also Jesse Fowler. I saw John Griffin first. He was holding the car door open and talking to somebody inside. I didn't speak to anybody. I wasn't that close to them. I kept walking down Branch Street and as I was crossing Branch Street, I saw Jesse. He was coming from down Branch Street away from 401, walking toward me.

Q. At that time could you see John Griffin?

A. John passed me I think. I don't know what happened to him. I saw him and then I didn't see him. He passed me I suppose and Huck was coming toward me.

Q. All right, and what unusual happened?

A. Huck was coming toward me. I was crossing the street and he wasn't exactly coming toward me. He was coming down Branch Street. I was still in the street. He came down and I think he stopped Tootsie and asked where was John.

Then he walked toward me and he pulled out a gun.

Q. And did you become aware of John at that time?

A. Not until I almost got out of the street. John bumped into the back of me. Jesse then sort of stepped to the side and fired at him. I didn't know that was John at the back of me.

Q. All right. How much time between the time you were bumped in the back and the time the gun was fired?

A. Seconds. I could see and hear the gun being fired. I also had powder burns on my left hand. Jesse was standing from three to four feet from me at the time he fired
[ROA 32] the shot. Two shots were fired. After he fired the two shots, he turned and walked away. I saw John falling down the embankment. Right on Branch Street, the apartments are down and the steps leading up to the sidewalk. It is downhill from where he was shot to where Mary Raines' door is. He didn't roll all the way. I think, he kind of ran, kinda walked away from, like maybe onto the sidewalk and then fell and rolled down the rest of the way.

I did not speak to John or Jesse, nor did they speak to me. I did not stay until the police got there. I did not see any blood. I did not see what happened to the two little girls. I passed them too, I think. I received no medical treatment for my hand. Just a blister came on it and that went off.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. Brooks:

I must have been crossing Holman Street going onto the north side of Branch Street when I first observed Mr. Dolby's car. I knew Johnny Dolby; I live close to him. He lives 1338 and I live in 1334. I knew his car. I didn't notice it was him when his car came by, but I knew it was his car.

Q. How close to the car were you at the time it first stopped?

A. About a half block. I guess. See, one thing about Branch Street—half block—maybe another block somewhere else. It is a long block. It goes all the way. Goes east to west and then north to south and goes all the way around. I am not sure I saw the car when it first stopped. I know when I saw the car, the door was open and John was standing beside the car talking. It was halfway down the block. I just heard John tell him take him on home before I make him use what he has in
[ROA 33] his pocket. John Griffin told whoever was driving to take him home before he made him use what was in his pocket. I didn't know who was driving the car at that time. I was going home. The car had to drive past me because I had to walk up Holman Street. But when I was first conscious of it, it had stopped.

Q. Did you hear any other conversation?

A. There might have been but I didn't hear it all. If I did, I don't remember it. Mrs. Hall's children were standing on the sidewalk.

On the south side of Branch Street, there were two continuous buildings. One building is long enough, I think, to hold eight or ten apartments. Each building is something like a half block long. There is a gap between the two buildings of about 30 or 40 feet. The first time I observed Johnny Dolby's car, it was stopped close to that gap between the two buildings. There were two or three cars parked along the curb of Branch Street on the south side. There may have been some on the north side but I don't remember. About two of the cars were parked between me and where I saw the car stopped.

After I crossed Holman Street, I crossed over to the northeast corner of Holman and Branch and walked for a short distance on Branch Street then I slanted my way over going across Branch Street, going to the south side. I didn't go across the street straight. I went slanted, behind the two cars. The two cars were headed west toward Holman Street. They were parked on the wrong side of the street or the left side in the sense of

how you normally park cars. I was still in the street when John Griffin bumped into me. I moved from in front of him; I was proceeding to the south side of Branch Street. When I turned after the shooting, John had got on the sidewalk and started rolling down the hill toward the apartment. I
[ROA 34] was in front of the cars. The cars were parked on the side of the street. I was still crossing the street but I was going slanting some there; he passed between me and both cars. I hit the sidewalk, after he had been shot and I walked up and I looked back and he was rolling down the embankment.

Q. I believe you indicated that you did not see John Griffin at all until he hit you?

A. I saw him as I was walking up the street. I saw him. I continued to walk. He was walking toward Holman and I was walking toward the curve in Branch.

Q. Did you see John Dolby's car move off?

A. After he stopped the car, the car moved again. I don't know how far it moved. I say about two or three car lengths. Maybe two or three car lengths. Then the car stopped again and Huck got out and started coming down the sidewalk. When I saw the car stop a second time, I was still on the north side of Branch Street. I was crossing it. About ready to cross there.

Q. About what distance did you walk down the north side of Branch Street after you crossed Holman Street?

A. I am trying to remember exactly how far it was. It is hard to measure because I was going slanting. I say the distance maybe across the street and maybe a car length going slanted. After the shooting I saw defendant on the north side of Branch Street walking off. He was just a little bit before the first apartment. There is a vacant lot on Branch. Then there is an eight family apartment building. I say middle of that building—just a little bit beyond the middle of the building. On the north side of Branch Street, there is a sidewalk going over to the north direct perpendicular to the street. The apartments are indented on Branch Street on the north side.

[ROA 35] Q. Was the place where the defendant crossed the street parallel at that point where the sidewalk runs perpendicular to Branch Street?

A. Not quite there. A little bit before where the perpendicular sidewalk is.

I was not observing John Griffin immediately before he was shot.

Q. When he bumped into you, did you turn around to look at him?

A. Huck had the gun out then. I was more interested in him then than he (who) was bumping back of me.

Q. So you didn't see the defendant at the time he was shot?

A. Where he was, no sir.

COURT. You mean the deceased.

Q. I am sorry. The deceased, at the time he was shot?

A. No.

Q. At first when you saw him he had already gone from the curb over to the sidewalk?

A. Yes.

Mr. BROOKS. No further questions of this witness, Your Honor.

COURT. Let me ask you one, Mr. McCoy.

A. Yes.

COURT. What do you say the statement that you heard at the car was, you heard Griffin make?

A. Take him on before I make him use what he has in his pocket.

COURT. Take him on——

A. Yes, sir.

COURT [continuing]. Before I make him use what he has in his pocket?

A. Yes, sir.

COURT. All right.

[ROA 36] (Witness excused.)

Sergeant Kenneth Johnson, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Q. State your name and your occupation?

A. Kenneth Johnson, Sergeant Raleigh Police Department. I am normally a uniformed officer. I was called to 1300 Branch Street on the first day of July, 1973. I received information from police radio as to a shooting that occured there and proceeded to that location. It was approximately 8:20 p.m. when I arrived. When I got there, a crowd had gathered.

(Marked—Two photos State's 1, 2, and 3. [sic])

Q. Did you see the man that is pictured here, there at 1300 Branch Street?

A. Yes, sir, I did. I knew him before that day. Johnny Griffin was his name. He was laying on the porch at 1300 Branch. The porch consists of a cement slab and guard railings leading up. I believe three steps to the threshold. He was lying with his head toward the north. The door to this address was open. He was lying on his back. Officer Baker and Officer Monday were at the scene approximately the same time I arrived. I went to the porch, up on the steps and squatted down beside of the deceased. There was a, just a small amount of blood on his left side. He did have a shirt on, but it was pulled up.

Q. All right. What, if anything, did John Griffin have to say to you?

A. As I squatted down beside him, I—again,

[ROA 37] he was lying on his back and his head was hanging down off that slab. I picked his head up and at first I did not recognize him as being John Griffin. I asked him, I said, "Who shot you? His first statement was, "I am bleeding inside." And he was twisting back and forth as if he were in pretty much pain. Again, I asked him, I said, "Who shot you?" And he said, "Jesse." And the crowd, there was a lot of people around. In between that statement I told the officer to have the people to back away so he could get some air. It was pretty hot there, too. I again asked him. I said, "Who shot you?" He said, "I am bleeding inside." And again, I repeated. I said, "Tell me who shot you. Who did the shooting?" He said, "Jesse Fowler."

And the ambulance had arrived and the two ambulance attendants had the stretcher, transported him to the ambulance. And some statements were taken by Officer Baker and from there we left and went to 1338 Branch where other statements and interviews were taken.

I talked to John Dolby and Mrs. Hall and the two children that were supposed to be with the deceased.

Q. All right. That is all the questions I have.

Cross examination by Mr. BROOKS:

I did not ask John Griffin any other questions. I did not hear him say anything further. I didn't know John Griffin personally. I had previously worked that area for approximately a year and a half to two years, and I knew him by name and

knew him when I saw him. I never had arrested him. I just had seen him around. I had no personal knowledge that he had a record. I was under the impression that he lived in the neighborhood, from my work in that area. It
[ROA 38] had been approximately a year and a half since I worked that area. I did not know anything about the reputation of John Griffin. On July the first, 1973, when I went to 1300 Branch Street, no one accompanied me. There were two other officers at the scene, Officer Baker and Officer A. C. Monday.

I did not have a face-to-face introduction to John Griffin. During the time I worked that area I tried to be familiar with as many people that lived in that area as possible, through contacts I had. I had seen him a number of times around Peacock's Grocery, which I frequently went by that location. I do not recall who pointed him out to me. To my knowledge, he has never been involved in any situation where I was present as an investigative officer. Other than John Griffin whom I found on the porch, I did not see any other evidence that there had been any kind of shooting. I did not see Charles McCoy there at the scene when I arrived. I did not have occasion to talk with him that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, at this time I would move to introduce the photographs into evidence.

COURT. Any objection?

Mr. BROOKS. Your Honor, I would like the opportunity to approach the bench.

Mr. CALDER. Your Honor, may we approach at the same time?

COURT. Yes, sir.

(Counsel approach bench.)

COURT. Members of the Jury, you may be excused now until 9:30 tomorrow morning.
[ROA 39] 9-25-73 A.M.

COURT. I believe you had an objection?

Mr. BROOKS. Yes, sir. We do enter an objection to the two photographs on the basis that they depict the individual in a way other than the person about which the witness testified that he saw [sic]. The only reason for submitting it into evidence would be corroboration as to who the individual was, the identity of the person but the officer did not testify that he saw him in the condition depicted or that he ever saw him deceased in fact. I believe those photographs do show him deceased.

COURT. I assume that you may be planning to use them later, are you, Mr. Calder?

Mr. CALDER. Yes, Your Honor. Of course, the purpose for entering these photographs is to tie the doctor's testimony together with the other testimony in the case. I believe, the doctor reviewed the pictures.

COURT. I will reserve ruling then until you get to that point in the evidence. Let the jury come out, Mr. Mann.

(Jury returns to jury box.)

COURT. The State may proceed with its evidence.

Dr. Laurin J. Kaasa, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

My name is Laurin J. Kaasa. I am a doctor of medicine licensed to practice in this State and by specialty, I am a pathologist and am presently director of the laboratory at Wake Memorial Hospital. I am a graduate in medicine of the University of Minnesota. Following a period in the
[ROA 40] army, I came back to the States and specialized in pathology at the Wayne County General Hospital, which is in the Detroit area of Michigan, where I specialized in training of pathology. I have been in the practice of pathology since 1947. I am licensed in this State of North Carolina (1961) and in Minnesota. I did my twelve months internship in St. Paul, Minnesota.

Q. Did you have some special training in the field of pathology?

A. Yes. I secured this at Wayne County General Hospital, which is in the Detroit area where I specialized in pathology for 36 months. Pathology is that branch of medicine having to do with diagnosis and discovering the cause of disease by use of various tests on the blood, body fluids, testing blood, testing body tissue to come up with a diagnosis by way of bacterial study, chemical studies and tissue studies and an occasional autopsy, which is the examination of the body after death.

Q. Now, Dr. Kaasa, on or about the 2nd day of July, 1973, did you have occasion to examine the body of one John Griffin?

A. I did. These are pictures of John Griffin. I also took pic-

tures of Mr. Griffin's body when I examined it. I have them with me. Aside from the pictures, I am able to identify the body as that of John Griffin because the deceased bore a tag which is attached to the body on which his name was stated.

I examined the deceased at the hospital morgue facilities, Wake Memorial, on the morning of July 2nd, 1973. In the left chest at about the level of the 7th rib, in the midchest—and I will point to my body here—approximately in this location—about the level of the 7th rib, there was a
[ROA 41] wound, a defect in the skin which was consistent with that type of wound made by a bullet. This is the only evidence of any external injury.

The pictures there accurately illustrate what I saw on the body that day.

The internal examination disclosed a considerable amount of blood in the abdominal space and Mr. Griffin had expired as a result of shock due to this voluminous blood loss. The blood was coming, leaking from a large scaping [sic] wound in the abdominal aorta, which is the main blood vessel within the abdominal space. The bullet had penetrated the aorta and the bullet itself was lying free within the abdominal cavity.

Q. Dr. Kaasa, are you able to identify this?

A. I am.

Q. And what is this?

A. This is a plastic envelope in which there is a lead bullet.

Q. And have you seen the bullet before?

A. I have.

Q. Where and when?

A. I saw and retrieved this bullet from the body of John Griffin on July 2nd, 1973. I might add that this handwriting on the outside is in my personal handwriting. I also identified the bullet by scribing [sic] my initial "K" on the base of the bullet.

Q. Dr. Kaasa, as a result of your examination have you been able to form an opinion satisfactory to yourself as to the exact cause of death of the deceased?

A. I have.

Q. And what is that opinion?

A. That Mr. Griffin expired from shock as a result of voluminous, massive blood loss within the abdominal
[ROA 42] cavity due to leakage from a penetrating wound of the abdominal aorta.

Q. And was that wound caused by that bullet in your opinion?

A. It was.

Mr. CALDER. All right, that is all the questions I have.

Cross examination by Mr. BROOKS:

I indicated that I identified the body primarily from a tag that was attached to the corpse. I do not know who identified the tag to the corpse or attached the tag to the corpse. I have no other way of identifying the corpse, other than my recollection as to the pictures here at the present time, of course.

Q. Well, you are saying though, that the pictures are of the corpse that you examined, is that correct?

A. That is correct, yes, sir.

Mr. BROOKS. No other questions of this witness, Your Honor.

COURT. Anything else, Mr. Calder?

Mr. CALDER. Thank you, Dr. Kassa.

(Witness excused.)

Detective D. C. Williams, being first duly sworn, testified as follows:

DIRECT EXAMINATION

I am Detective D. C. Williams, Raleigh Police Department. No. I did not see the defendant on July 1, 1973, but I did see him on July 2nd in the magistrate's office in the basement of this building. He was with Sylvester Jones. At
[ROA 43] that time, I was interested in talking to Mr. Fowler. Before talking with Mr. Fowler, I advised him of his constitutional rights. I had a form with me which I read to Mr. Fowler. It states: "Your Rights." Says before we ask you any questions, you must understand your rights. You have the right to remain silent and not make any statement. Anything you say can and will be used against you in Court. You have the right to talk to a lawyer for advice before we ask you any questions or have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the Court before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer. Waiver of Rights. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone. This was

read to Mr. Fowler by me. It was also handed to him to read for himself.

After reading this, I asked him did he fully understand his constitutional rights and understanding them, did he want to make a statement now without a lawyer. He stated that he would. He signed this form. This form was witnessed by Sylvester Jones and myself.

Q. All right. And did you subsequently question Mr. Fowler?

A. Yes, I did. Sylvester Jones was present the time I questioned Mr. Fowler.

First of all, Mr. Fowler advised me that he wanted me to know and understand that when he shot John Griffin, he was drunk. He told me that he had gotten drunk on
[ROA 44] Saturday night. When he got up around 11:00 a.m. on Sunday, he had started drinking again. Stated since Saturday night he had drunk approximately sixteen beers, one pint of scotch, approximately one quart of wine; that after he had gotten up on Sunday, he want to Sylvester Jones' house, started playing dice. Shortly after he got there Sylvester Jones got up and went to the bathroom and left ten dollars lying on the floor; that when Sylvester returned, it was gone, the ten dollars on the floor. When Sylvester returned an argument started between Jesse and John Griffin over the ten dollars. Said northing resulted from this argument.

After they left Person Street where Sylvester Jones lives, Jess Fowler and his wife went to King's Lounge on Rock Quarry Road sometime around 6:00 p.m. After they had arrived there, John Griffin and Sylvester Jones came in and started drinking beer. Said Jesse went to play a record on the juke box and John Griffin came over to his table and wanted to start an argument again in reference to the ten dollars at the dice game.

John Griffin asked Jesse Fowler to come outside and to fight him. Mr. Fowler stated that he went outside and just as soon as he walked out the door, John Griffin hit him in the face, knocking him down and causing his nose to start bleeding real bad. Sylvester Jones at this time came over and stopped the fight and that Jesse Fowler and his wife went home. Stated at this time he had a .38 caliber pistol in his pocket with him. After going home and staying a few minutes, he headed for Walnut Terrace to see a friend.
[ROA 45] arriving at Lenoir Street. When he got to Lenoir Street, Ronald Dolby picked him up

and drove him to Walnut Terrace and they got to Branch Street; they saw John Griffin again on the sidewalk. Stated John Griffin came over to the car, opened the car door and wanted to fight him again. At this time, he told Dolby to let him out of the car so he would not get into any trouble. Stated that he started walking away and John came after him.

When John came after him, this is Mr. Fowler doing the talking—I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away. I went to Wilmington Street and walked around for a while and then went home. I told my wife what had occurred and remained at home. Sylvester Jones came to my house and told me that John was dead and I told him that I had shot John with my gun, a .38 caliber. Sylvester advised me to give myself up and not to run. We went then to the Sheriffs office, where Sylvester asked the sheriff to call you. Referring to me.

Two officers from the police department came in and served a warrant on me while we were waiting for you. At this time, I am high off beer and wine, but I know what I am doing and I am in my right state of mind.

The waiver of his rights was signed, read and signed by him at 2:20 a.m. This would be on July 2, 1973. His condition at that time was pretty much as it is now with the exception of his eyes were real bloodshot. I have got photographs that I took of him that morning. There was also a laceration on his nose. As a result of that, he was carried to Wake Memorial Hospital for treatment and was advised by the attending physician that the nose was broken. There was no blood on his shirt.
[ROA 46] He advised me that the clothes that he had on at the time when he first got in the fight were taken off and thrown away at his home. Yes, I smelled the odor of intoxicants on his breath. I wouldn't say his speech was impaired. He appeared to me to be in complete control of both his mental and physical faculties at the time I interviewed him.

However, there was some odor of intoxicant on his breath and his eyes were bloodshot.

I did not find the gun. I do not have any information that the gun was found.

Q. What did you understand—strike that. Repeat what you said about what Jesse Fowler told Ronald Dolby as he got out of the car.

A. Told Mr. Dolby to let him out of the car that he didn't want him to get into any trouble.

Q. Who is him?

A. Referring back to Dolby.

COURT. Mr. Williams, while we are at that point, would you go ahead and relate what you said that he said from that point on through the time of the shooting, please?

A. When we got to Branch Street, I saw John on the sidewalk. He came over to the car and opened the door and started to fight again. I told Dolby to let me out so he would not get into any trouble. I started to walk away and John came after me. I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away. I went to Wilmington Street——

COURT. That part answers my question. You may go ahead Mr. Calder if you have any more questions.

Mr. CALDER. I believe that is all the questions I have.

[ROA 47] Cross examination by Mr. BROOKS:

I never knew John Griffin. I received a phone call at my home approximately 1:15 a.m. on July 2nd from Sylvester Jones in reference to Mr. Fowler requesting that I come to the magistrate's office to meet him. I first met them, it was approximately 2:10 a.m. in the magistrate's office in the basement of this building. The statement that I referred to a few moments ago, is a statement of the defendant as written by me. He did not sign the statement. We went over the statement twice and corrected it as he wanted it.

Mr. BROOKS. No other questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, at this time I would move to introduce the photographs into evidence.

COURT. Which ones, Mr. Calder?

Mr. CALDER. I would like to introduce all of them.

Mr. BROOKS. We will object, Your Honor, on the grounds that they would be prejudicial.

COURT. Let me see them, Mr. Calder.

(Hands photos to Court.)

COURT. Objection overruled. They may be admitted.

Members of the Jury, these photographs which may be exhibited to you are to be considered by you as they explain and illustrate the testimony of the witnesses who may have referred

to them and not as substantive evidence. You may, if you like, pass them along.

[ROA 48] *Jonice Marlene Griffin*, being first duly sworn, testified as follows:

. Direct examination by Mr. CALDER:

My name is Jonice Marlene Griffin. My nickname is Tingaling. I am eleven and am in the seventh grade at Carnage Junior High. There are five children in my family. There is one younger than me, and that is Paula sitting right here behind you. She is nine. All five of us live over on Branch Street with our mama. I remember back on the first day of July of 1973 when my daddy, John Griffin, came over to see us. No one was with him. When he got there, he just asked mama could we walk around the corner with him, and me and my little sister, Paula, went walking with him. We walked up toward Mrs. Raines' house, at the corner of Holman Street and Branch Street. My daddy was talking to Mrs. Raines and then my cousin Ronald Dolby drove up and then my daddy snatched the car door open and my cousin said: "Don't snatch the car door open no more", and then just shut it and drove off.

And then after a while Jesse jumped out of the car and went back down the street, and shot my daddy. My daddy was hiding behind Charles McCoy. And then my daddy came up and he shot him. I did not see the gun before he shot. He shot once. I heard the gun go off twice. Then I ran around the corner back to mama. I did not see where Jesse went. I did not hear my daddy say anything to Jesse before the shooting. Jesse did not say anything to me before the shooting. He spoke to my sister for just a minute.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. BROOKS:

I do not remember what time of day I first saw my father that afternoon on Sunday, July the first. I was outside playing when he came. When I first saw him, he was

[ROA 49] in a car, but he was not driving the car. I do not remember who was driving the car. I had not had anything to eat that evening. It was almost dark.

It was turning dark about 8:25. But I saw my father a little earlier than that. I do not know how long before 8:25 I might have first seen my father. The car that my father got out of stopped in front of the house at 1338 Branch Street. We walked down to Holman Street. I was on the corner when I first saw

my cousin and his car; he was coming around the corner. The car did not stop there at the corner. It drove up from the corner. It was in the street; my father went out into the street to pull the car door open.

When the car door was closed, Johnny Dolby drove on. The car stopped again in the middle of the block. The defendant got out of the car and my father went on walking up the street toward Holman Street. I did not see cars parked on the south side of Branch Street. I saw my father hiding behind McCoy. McCoy was walking toward his house. My father was walking behind him, crouched down. McCoy was coming down off the curb when my father was crouched behind him.

I was going to run around the corner where Branch Street turns. I was not between the defendant and my father. I was between my father and Holman Street. I saw my father get behind Mr. McCoy when Jesse came out of the car. At that moment it stopped and he was getting out. My father got behind McCoy, and started tipping behind him.

COURT. Did what?

A. Tipped behind Charles, yes, sir.

He did not have anything in his hand. My father tipped behind McCoy about two car lengths. McCoy
[ROA 50] was walking very slowly. Slower than I would walk. We were closer to Highway 401 than Holman Street. Mrs. Raines' house was all the way down the street. I don't know how many different apartments away from Mrs. Raines' I was. I was looking at my father when he was shot. McCoy was not in front of me. McCoy had turned around, too. He was going on up the street and then when he heard a shot, he turned around and looked. I did not see my father run into McCoy. I did not see the defendant after the shooting. The minute the gun was fired, I ran on home. My sister did not go with me to the house.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Paula Griffin, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Paula Griffin is my name and I am nine. I go to school at Carnage and am in the Fourth Grade. I was with my sister Jonice and my daddy down close to Mrs. Raines' house on the day we are talking about. I don't know how long daddy had

been over there at our house or in the neighborhood at that time.

It was still light and I saw Ronald come driving up. He came up a little bit close and then he stopped in the street and my daddy went to the car and snatched the door open and he said, "Don't snatch the door open no more and he closed it." [sic] I heard my daddy say, "I don't want to fight you no more," and then Johnny, he just drove up the street. I knew Jesse Fowler at that time; I had seen him before. He was the one that my daddy was talking to. Jesse did not have anything to say. Ronald drove on up the street. I did
[ROA 51] not see him stop again. I did not see Jesse Fowler again until he came down the sidewalk.

A. And I was going up there to the hill on the sidewalk and he just came down there pass [sic] me and asked me where my daddy was at. I said: "I don't know." I did not see a gun at that time. Then he went down there and then he stepped off the curb and then he just shot him. I just stood there and looked. Jesse went on the other side of the street and walked up the sidewalk. Daddy fell and then he went over there on the grass. I did not hear Jesse say anything else to my daddy. I did not hear daddy say anything else to Jesse. At the time that Jesse stepped off to the side, Daddy was coming up close behind McCoy.

My mama came around the corner and got me.

Cross examination by Mr. BROOKS:

I first saw my father that afternoon at my house. I was outside. It was somebody driving but he won't [sic] driving. I went to walk with him around to Holman Street. Ronald Dolby is my cousin. He is also known as Johnny. I saw Johnny stop in the middle of the street. But he was almost at Holman Street. Daddy snatched open the door and my cousin Johnny said, "Don't snatch it open no more ["] and he closed it back. I was standing right there on the curb at the time. I went up close to the hill and stood. It is a little hill on Holman Street where they put the dirt on the sidewalk. I was there when my cousin stopped the second time. I stayed there throughout from that time until the shooting occurred.

I know Jesse Fowler. I don't know how long I have known him.

Q. You have known him two years.

A. Yes.

I do not know anything about his reputation.
[ROA 52] He has been to my house before but not many times. I don't know how long had it been since John Griffin lived at my house. My father lived in Goldsboro. I do not know whether or not he has ever been in jail.

Q. Had your father ever been convicted of a crime?

Mr. CALDER. Your Honor, I object.

COURT. Objection sustained to that question.

Johnny Dolby was living at my house. I do not know how long he had been living there. After the shooting, I saw the defendant cross to the north side of the street. He went up there through that path under the bridge, under 401. He was walking all of this time.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, I believe I neglected to introduce the bullet into evidence. I would like to do that at this time.

COURT. It may be admitted.

Mr. CALDER. That is the evidence for the State, Your Honor.

Mr. BROOKS. I would move for a dismissal at this time at the close of the State's evidence.

COURT. Do you care to argue it, Mr. Brooks?

Mr. BROOKS. No, sir.

COURT. All right, motion denied.

Mr. BROOKS. Note an exception, Your Honor.

DEFENDANT'S EVIDENCE

[ROA 53]

COURT. Evidence for the defendant?

Mr. BROOKS. Yes, Your Honor.

Connie "Doc" Holliday, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

My name is Connie "Doc" Holliday. Doc is not my nickname, that is my given name. I live at 2816 Sylvester in Kingwood Forest in the eastern part of Raleigh. I know the defendant. I saw the defendant on June the 30th, a Saturday, 1973. We had planned a fishing trip. This buddy of mine he has a boat and we had planned to go fishing that Sunday afternoon but I didn't get around to making it because my mother had to go to the hospital and my wife was out there visiting her. The defend-

ant and I had been fishing on several occasions during the summer. We go down to the Neuse River and we knowed several ponds, privately owned ponds, and we go down there and fish.

Q. What do you carry fishing with you when you go fishing?

A. Well normally I carried a .22 automatic to shoot snakes with. The defendant carries a handgun when we go fishing; it is between a .32 and .38 caliber. He carry tackle with him. Others were going fishing with us. Wilbert Carter and several of us were going. When I first saw the defendant on June the 30th, on the Saturday, it was kinda early in the morning. I guess it was about 10:30. I saw him later on that afternoon. I guess it was about 4:30. We was still talking about fishing but I told him I wouldn't be able to get away and if they were continuing to go on fishing—I mean, it would be all right. I would still try to get the boat for them. I saw the defendant on Sunday, July the 1st, 1973. Oh, I guess it was about, it was after 4:00 o'clock in the afternoon when I saw him.
[ROA 54] We were still planning to go fishing that day. My fishing gear was in the car. The defendant had one rod and reel and I think a cane pole he had with him in the car. I saw him down in Southgate. That is about two and a half to three blocks from where he lives.

A. I had planned to pick him up on Sunday to take him fishing.

A. At the time I saw him, yes, I'd say he had a pistol with him.

I didn't pick him up at that time. I stopped in the King's Lounge and was talking to some of the fellows that was there and I never did pick him up to take him. I didn't have the car all that Sunday afternoon because my wife she had went out to the hospital, and actually, I was waiting on her to return and then we was going on fishing. I was over to Wilbert Carter's house. He lives across the street. So I told her to pick me up at Southgate on the way from the hospital. I went down to the basketball court with them and they played a little basketball in the little mini park they have over there in Kingwood.

I know John Griffin. I couldn't say whether or not he got in a lot of fights.

Q. Did he have what you call a big mouth?

A. Well, he talked quite frequently.

I last saw the defendant on Sunday, the first of July, 1973,

about 4:00 o'clock. Maybe between 4:30 and 5:30. Something like that. I don't know what it started about. So I can't say what actually happened but I know him and John got in a little scuffle there by the lounge. I was there sitting out there on the bank.

[ROA 55] A. I was sitting across the parking lot on a little slope near a fence. I saw the scuffle. Oh, it didn't last but about five or ten minutes. Might not have lasted that long because it was broken up, by Mr. Jones. When I last saw the defendant I was still planning to go fishing, but after they, this little argument developed—I didn't tell them I wasn't still intending to go but I had thought of it after that, that little argument that I would just call the whole thing off, but I hadn't told them anything about it yet. So far as I knew, the defendant was still planning on going fishing with me. I have been knowing the defendant ever since about 1963 when I first came out of the service. I would not characterize him as a violent type person.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

A. I didn't see Mr. Fowler and Mr. Griffin inside of King's Lounge. I only saw them on the outside. I saw them when they first walked outside but I wasn't aware what was going on. They just walked out and that is when it started. I wasn't paying too much attention to them because I didn't know they had actually been engaged in an argument on the inside. I saw the first lick when it was passed and that was about it and they scuffled around a while. I didn't become involved in it. A few fellows was standing around. I did not know at that time what they were fighting about. I was not at the dice game.

I saw the defendant earlier Sunday morning at Kwik-Pik and also saw him Sunday afternoon at the basketball court and at King's Lounge just before all of this happened, but after the little scuffle there in the parking lot. I didn't

[ROA 56] see Jesse anymore. I saw him three different times that day.

I work for Car Beauty Center. Defendant is a pretty good basketball player. He played kind of good. He played for between 45 minutes and an hour. This was about 3:30. I did not see how defendant go away from the King's Lounge. I don't know whether he walked, caught a ride or what happened. I have

never been in a fight with Jesse Fowler. I have never been in a fight with John Griffin.

Q. How long had you known John Griffin?

A. I met John Griffin about the same time that I learned [sic] defendant. John was a few years older than the defendant. I knew defendant when he was maybe 17 or 18 years old. This was when I first got out of service.

The gun I had seen on several occasions in defendant's home and each time that we went fishing he had it with him. I would say it was the same one. I never heard defendant express any great attachment to that particular gun. As far as I knew, it was just a regular gun.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. Redirect, Your Honor.

Redirect by Mr. BROOKS:

I saw defendant about ten on Sunday morning before the Kwik-Pik had closed. I think he came down there to pick up something for his wife.

His fishing gear was already in my car on Saturday. I did not carry him anywhere on Sunday morning.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

[ROA 57] *Sylvester Jones*, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

My name is Sylvester Jones. I live at 522 Person Street. I have known the defendant since '63. On June the 30th, 1973, I saw the defendant at King's Lounge, on a Saturday. I do not remember what time of day it was. I see him up there on other days.

That particular Saturday, we were discussing going fishing. I was going out Lake Wheeler or either Turf Grass. That Friday night I had planned to go with a friend of mine named Delmar because we usually go fishing every Saturday. It so happened that Saturday he didn't come by. So I left and went up to the King's Lounge and we were just planning to go to Lake Wheeler or either Turf Grass. Anywhere we thought the fish were biting at. We had not planned any special time to go fishing on Sunday. I didn't leave King's Lounge with defendant. I don't know what time I left. I saw him on Sunday, July

the 1st, 1973. I don't know what time it was. I do not recall what time I got up on that Sunday. Sunday morning I went to play basketball at the mini park on Lenoir Street. Emory Brooks, Johnnel Brown, Swade Archibald, a guy named Skin, his brother Puddin' and John Griffin were with me. I forgot who the other person was.

John Griffin did not play any basketball; he went to sleep. The defendant wasn't down there at the time I got there. I did not see him earlier that Sunday morning. We got ready to leave after playing our last game and that is when defendant came up. Somebody was with him when he came, but I forgot who it was. I was planning to go fishing with him later that day. When I go fishing, I carry a gun with me for snakes. Most of the people going fishing with me carry a gun to shoot snakes with. The defendant carried a gun with him
[ROA 58] when he would go fishing with me. He generally carried a .38. I am not sure. I cannot recall ever seeing him shoot a snake.

At the time defendant came to the basketball court, we was drinking water and some guys still out on the court. We were through playing. Then I went home. Mostly everyone down there playing basketball with us went to my house. The defendant came to the house about five or ten minutes afterwards. I don't know where he had went to because we was talking about getting some cards and playing Bid Whisk. Couldn't find no cards because the store was closed.

The basketball court from where I live is about six or seven blocks. When we got to my house, we sat around and waited to see if we could get some cards, then we started drinking beer and started shooting some dice. All of us was shooting dice for money. When defendant came, we was already shooting dice. And so he kneeled down beside of me and so at the time I had the dice, so I was shooting. So I had to go to the rest room because I had been drinking a lot of beer. So I left my ten dollar bill on the floor and told defendant (Jesse) to keep an eye on it for me. When I came back, my ten dollar bill was gone. I asked who had my money. At first didn't nobody say nothing. So I stood up—after I kneeled down, I stood up. I told them like I wasn't playing. I want to know where my money was.

About that time defendant told John Griffin to give the money to me. Then John Griffin slid the money back across the floor to me. I don't know if it was under his foot. Griffin

told defendant that he didn't have to steal. That I would give him anything he wanted. I don't know if he would try to steal it or playing or what but he gave the money back to me and so when I got the money back, I started back
[ROA 59] shooting dice. There won't [sic]no argument. I don't recall John Griffin saying anything else to the defendant after I got my money. I do not recall anything else that the defendant had to say, except, he told me that he was fixing to leave and asked me for a dollar. I told him that I would be out at King's Lounge later on and I would give it to him. That I couldn't give it to him now because I was gambling. I don't remember what time it was when we finished. It won't [sic] too long because w:.n't [sic] too much money around the table. It was in the afternoon. Exactly what time, I don't know.

When I got through shooting dice, I told Johnny I was going to take my bath and was going out to the King's Lounge and that I wasn't going to stay long because I was going to take my girl friend to the movies. I went and took a bath and John Griffin and myself and another dude named James—I forgot his name. I haven't seen him in about three months, we caught a cab and went out to King's Lounge. When we got there, I ordered a pitcher of beer to sit on the table. I don't know what time I got to the King's Lounge. It was in the afternoon.

When I got to the King's Lounge, I saw the defendant as I walked in because he came up on my side and asked me for the dollar. So I gave him the dollar. Then I went and got my pitcher of beer and sat it on the table. John, a dude named James, were at the table where I sat down. I don't know if John Griffin saw defendant because he was behind me. He had to see them then. The defendant went to the record player after I gave him the dollar. When the defendant came by the table and John Griffin called him over to the table and told defendant if he pulled that shit like he pulled this morning, that he was going to kick his ass. So defendant told him
[ROA 60] that he wasn't going to do nothing to him. John then invited defendant on the outside.

A. When John invited him out, John went out the door first. Defendant came behind. When they got outside, John turned arcund and hit defendant and knocked him down. I was the third one to go outside. John Griffin hit defendant in the face somewhere. When he knocked him down, I don't

know if he kneed him or kicked him, but his nose started bleeding then. That is when I broke it up. Defendant went on the side of the building. I don't know where he went. I didn't see him no more. John Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him, you know, I couldn't do that. So I told Mr. Hodge would he take John back across town. I did not see John Griffin again that day because when Hodge took John across town, I went and got my girl friend and we went to the movies.

Q. Was John Griffin staying at your house?

A. He wasn't exactly staying at my house. He had a room around the corner but he had not paid his rent in about a week or two and he spent a couple of nights around there. Which I wouldn't say exactly that he was, you know, a permanent resident. My address is 522 Person Street. I think John Griffin lived on Lenoir Street. I do not know in whose home he was rooming. I lived about three or four houses from where Griffin was living. I have an aunt who lives about three houses from where John Griffin was living. The houses are close together. John Griffin had spent a couple of nights there, too. I wouldn't say that he was staying anywhere he could find a place. Like I say, he had a room around the corner. He had just got a job. His payment on his room wasn't exactly kept up, you know, because most of the time when he got a check
[ROA 61] he would go see his children, you know.

At the time I didn't pay no attention as to whether or not the defendant had his pistol with him that day. When John Grifffiffin asked me for my pistol after the fight, I do not know whether the defendant was in sight then. I think the defendant had on a pair of blue short pants that day. I won't paying that much attention. I don't know if he had on shoes or tennis shoes or barefooted. I don't know. I do not recall what kind of shirt he might have had on.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

I saw the defendant sometime either real late Sunday night or early Monday morning after I came from the movies. I took my girl friend home, which they stay almost next door to each other. My girl friend—is her brother. You know, were brothers and sisters.

COURT. Your girl friend is Jesse's sister?

A. Yes, sir. See, when I left the movies, it was raining, drizzling a little bit. So I walked down to my house. When I got to my house and went in there wasn't anyone there. So we came back on the porch and was sitting on the porch until it slacked up.

About that time Johnnel Brown and his girl friend came by. He asked me did I know John was dead. I told him, "No," because I had just left the movies. I had not seen Jesse at that time.

A. And so I told him if he could take my girl friend home, I could find out, you know, if it was true. Like I say, they stay about two doors from each other. When they took us home—my girl friend home—she went down, you know,
[ROA 62] and asked his wife and she said, yes, defendant was in there then. His wife and children were there. Jesse's sister asked them if John was dead. I talked to defendant. I didn't ask him exactly what happened, you know, like I was trying to find out what he was going to do. You know. He told me that he had shot John. He said that he wanted to turn himself in, but in a way, he was kind of scared. I told him, my girl friend told him and his wife told him that he ought to. I reckon this was after midnight; I don't know. I did not ask him why he shot him. He did not say why he shot him. I went with him to the magistrate's office. I don't know if his mother drove or who drove. Somebody in the family drove. About five or six of us went down I believe. I didn't call the police until I got to the sheriff's office.

I was present when Mr. Williams questioned the defendant. I had never known Jesse and John to fight before that day. I had never had a fight with Jesse.

Q. Had you ever had a fight with John?

A. Not exactly fight, no. I won't [sic] exactly mad about the ten dollars, but I didn't want to lose it because it was the only one I had. After I got my ten dollars back, it didn't seem like they were mad, you know, I got my ten dollars back. Nobody didn't say nothing. Just got on back down and started shooting dice. Jesse didn't say nothing nor John say nothing.

Q. At the time John invited Jesse outside from the King's Lounge—were they hassling about that same ten dollars or something else or do you know?

A. Like I told you, when Jesse came by the table, John told him if he did—like I said, if he do it again, what he did this

morning, you know, what was going to happen. I reckon he was referring to Jesse saying that he had the ten dollars. That is the only thing I could recall, you know. That
[ROA 63] is the only thing they had words about was that ten dollars.

James, this other man that was with us at the table, used to stay with me and he got behind in his rent. He owed me $30.00 and I hadn't seen him.

I did not in fact have my gun when John asked me for it. Defendant said nothing to John to make John think that he needed to have a gun, after I broke the fight up.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. Redirect, Your Honor.

Redirect by Mr. BROOKS:

The defendant and John Griffin had been friends.

Q. You indicated in response to the solicitor's question—he asked you had you ever had a fight with John Griffin and you said not exactly. What sort of conflict, if any, had you ever had with John Griffin?

A. We had an argument. I don't know if he was jiving or serious or what, you know. Seem like most of the guys that I hang around with, be around my house at the time, something will be done and say something. We don't know if they want to fight or what. John Griffin and I had arguments, over money, over girls—things like that. Like he did get in a lot of arguments. Like I said, I don't know if he was serious or what, you know. Like you can half understand. You don't know if he is serious at times or what, you know. He like to talk a whole lot. He would shoot a lot of bull. I was not afraid of John Griffin.

Q. Did you take much of what he said seriously?

A. All depends on what, on how I was. If
[ROA 64] I was sober, I would look at him and laugh but if I had been drinking and half mad myself, I didn't take it.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

Mrs. Vasti Fowler, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS.

Vasti Fowler is my name. I live at 1813 Liberty Place. The defendant is my husband. We've been married about three years. We live about a block from King's Lounge. It is on Rock Quarry Road outside the city limits. On Sunday, July the first,

1973, I got up about 8:30. The defendant was at home at the time I got up. I prepared breakfast when I got up, about 9:30. The defendant was up at that time. He didn't have breakfast. He left the house about quarter past nine or something like that.

I got dressed and went to church about quarter till ten or 10:00. After church, I came back home, undressed and went and picked up Doris Clacks. She lives about a mile from me. When I went to pick her up, I had my children; one is three and the other one is six.

Then I drove back dow.. to the Kwik-Pik store yard. The Kwik-Pik is in the same building with the King's Lounge and there is a Cleaner's in between it. I drove up and Jesse saw me as he was coming out of King's Lounge. I didn't get out of the car. No one went in the Kwik-Pik. When he came over, he asked me to come over to the King's Lounge and drink some beer with him. It was about three o'clock, I think. No one was with Jesse. I told him that I would have a
[ROA 65] beer after I took my boys home. Doris went with me to take the boys home. I left the car there and walked back with Doris. I returned to the King's Lounge about twelve or fifteen minutes later. Jesse was inside when I approached the King's Lounge. We went in and sat down and he ordered some beer and I started drinking beer. Jesse and Doris were at the table where I was seated. We just sat and talked for about two hours.

I didn't know John Griffin, but I remember when Sylvester came in. I know some more people were with him. Sylvester arrived close to five. From the time Sylvester and those came in it seemed about twenty minutes or so before Jesse got up from the table. After Jesse got up, I heard some loud talking and I looked back and they was just talking and I thought nothing else about it until I heard someone say, come on outside.

A. So, Griffin went outside first and Huck went out behind him. I did not get up right then because I just thought they was just talking, you know. And so then I decided I would get up to peep at Jesse through a large glass door. When I peeped I saw Jesse lying on the ground and Griffin was over him with one hand on his neck and his knee was up along in here and Jesse was just lying there. I stepped outside the door and Sylvester was pulling Griffin's arm back off Jesse.

A. And then Jesse got up and he was bleeding and I told him to come on. He had his head down and he was mainly just mak-

Direct examination by Mr. BROOKS.

Doris Marie Clacks is my name. The defendant is my brother-in-law. I married his brother. I live at 2024 Waters Drive which is about two miles from King's Lounge. On July the first, 1973, I was living at 713 Rock Quarry Road which is a mile or so from the King's Lounge. Mrs. Vasti Fowler came and picked me up on July 1, 1973 and we went back to her house. We didn't stay there too long. We walked to the King's Lounge. It was about 3:00 p.m.

A. Well, I guess I stayed at the King's Lounge about an hour and a half. I saw the defendant there. We drank some beer. Vasti and Jesse were at the table. Defendant got up from the table and he was going to the bathroom. On his way to the bathroom, I saw something sticking in his right-hand pocket, that looked like a gun and he pushed it down like that and went on to the bathroom. He came back to the table where we were sitting at. I don't know John Griffin. I wasn't at the King's Lounge at the time any fight occurred. I left the King's Lounge about 4:30 or 5:00. I did not see the defendant anymore that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

[ROA 68] Cross examination by Mr. CALDER:

A. I could see the handle of the gun. And after he pushed it down, I don't think the handle was showing.

Mr. BROOKS. You may be excused.

(Witness excused.)

James McIntosh, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS.

My name is James McIntosh. I live at 1618 Fountain Drive, Raleigh. I am self-employed as a carpenter. I have known the defendant approximately three years. I first saw the defendant I say around 4:30 or 5:00 o'clock on July 1, 1973, when I was on my way to work in King's Lounge and they were on their way out. I was selling beer at the King's Lounge.

I don't recall seeing the defendant return to the King's Lounge after that first meeting. I observed the fight between the defendant and John Griffin about 4:30 or 5:00 o'clock when I was on my way to work. Well, they were coming out of the door and I was trying to get in. So all of a sudden—John Griffin hit him. I didn't know John Griffin. They just scuffled after that until Sylvester broke it up. I saw him go around the

ing steps. So I pulled him away from the crowd sort of and I told him to come inside and let me clean him up and he just said, "No, I will be all right." And he was still bent down bleeding. I was standing there with him and I repeated for him to come inside so I could help clean him up and by this time I heard somebody ask for a gun beside me
[ROA 66] because Jesse and I were standing on the corner of the building and I heard somebody ask for a gun and then I told Jesse, I said, "Come on, let's go home." And I went back inside the King's Lounge and got my bag and cigarettes off the table and I went home. Jesse didn't go home with me.

A. I left him standing on the corner. I saw Jesse again that day about 8:30 or 9:00 p.m., on the corner of Lee and Blount Streets. He had called for me to come and pick him up there. He called about 8:25. When I went to pick him up, his brother, Maurice, was with me. I then started back home and Jesse told me to stop at the King's Lounge. I let the defendant out there and went home.

I next saw the defendant that day it seems like about an hour or thirty minutes later at home.

I fixed him dinner. I had already had dinner. He had baked chicken and string beans and potatoes. I can't recall talking with him while he was eating. Defendant stayed at the house for the rest of the evening.

A. Later, I carried him to see his mother and then I brought him down here to turn himself in. He wanted to see her before he turned himself in. Jesse told me when he called me on the phone to come and pick him up that he thought that he had shot John and wanted me to pick him up.

I drove him down to the police station arriving about 1:30 a.m.

A. I was at the police station until the detective carried him to the hospital after 2:00 a.m.

I didn't ask the defendant why he had shot John Griffin. He never told me why he had shot John Griffin.
[ROA 67] I was just blank.

Mr. BROOKS. No further questions of this witness, Your Honor.

Mr. CALDER. Your Honor, I don't have any questions for her.

(Witness excused.)

Doris Marie Clacks, being first duly sworn testified as follows:

building. Where, I don't know. I asked Nathaniel Bud Hodge to take John Griffin home. I didn't want any more trouble in front of the place. John Griffin got in the car with Bud Hodge. After that, I went inside and went to work. I don't remember seeing the defendant again that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examnation by Mr. Calder:

John Griffin got the best of the fight.

[ROA 69] Mr. CALDER. That is all the questions I have.

(Witness excused.)

Charles Gene Rogers, being first duly sworn testified as follows:

Direct examination by Mr. BROOKS:

Charles Gene Rogers is my name. I stay at 412 East Lee Street. I have known the defendant about 15 years. My wife was in school with the defendant. On July 1, 1973, I was coming out of the Kwik-Pik. I went in there and got some groceries and I was going to my car which was parked in front of a laundry, a cleaners—dry cleaners which is next to the lounge. They call it King's Lounge and as I was going to my car I saw John Griffin come out of King's Lounge between 5:30 or 6:00. I had known John Griffin about twenty years.

Then I saw John Griffin turn around and it appears that he hit somebody. When I got up close, he was down on him with his knee, seemed like he kneed him, too, after he hit him and so I didn't stop to see what it was. I was going to my car and a fellow pulled John Griffin off of this fellow but at the time I didn't know it was Huck. I didn't know Huck was on the ground because I couldn't see who John Griffin hit. Then as he was pulling him, Huck went around the building holding his head down, which I still didn't know it was him and then John Griffin told the fellow that had pulled him up to let him have a pistol that he was going to kill—well, he used some foul language at the time and he asked him a couple of times for his pistol. So I got in my car and as I was going around the King's Lounge, going out, I seen that it was Huck. Then I recognized it was Huck and I told him, I said, "Man, you better go ahead

on because John Griffin is trying to get a pistol

[ROA 70] to kill you." And I was going on out the driveway and he was coming on around behind the King's Lounge. I did not see John Griffin leave. It appears

that the defendant was leaving because we was coming behind me walking as I was driving. He was walking toward Rock Quarry Road. He was going through the project like going to Rock Quarry Road. I did not see the defendant any more that day.

John Griffin was prone to get involved in fights. I have been knowing John Griffin a pretty good while. He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth. Well, I didn't take seriously what he said because I have been knowing John [sic]. I know that he always runs off at the mouth and continues to get whopped a lot by his mouth.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

After I told Jesse that he had better get away from there that John was going to get him with a gun, he said, "Okay, I am going." He still had his head down and at that time it appears that two people was coming out of the back door of the King's Lounge, you know, and he sort of hesitated and then when I seen him as I was coming out of the driveway he was coming on back around King's Lounge. He didn't say anything to me about a gun that he had. I don't know whether he had a gun but he had a knot in his pocket. I don't know what it was. I was not afraid of John Griffin.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

[ROA 71] COURT. You have already been sworn to testify and are still under oath.

Johnny Fraizer[2] *Dolby*, being called by the defendant, testified as follows:

By Mr. BROOKS:

Johnny Fraizer Dolby is my name. On July the first, 1973, I picked up the defendant and took him to Walnut Terrace.

Q. We have a blackboard. Would like for you to demonstrate the street, the shape of the street where you took the defendant.

A. Yes, sir.

Mr. BROOKS. With the Court's permission, would like for him to come around and indicate on the drawing.

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[2] This witness' middle name is spelled "Frazier" at p. 13, *supra* [ROA 22].

COURT. All right.

Q. There is already a facsimile up here. What I want to ask you is whether or not this looks anything like Branch Street and Holman Street in Walnut Terrace?

A. Except this stop sign.

Q. I can't draw it.

COURT. Speak up.

A. Stop sign right here. There is a street that comes down—street that comes down in here and this right here, this is Fayetteville Street right here. Fayetteville Street right there and you turn left right here going to Branch Street and I turned left right here——

Q. Which direction would you be going in?

A. I was going in the south direction.

Q. All right.

A. I was going in the south direction down Fayetteville Street.

Q. Up there in the right-hand corner where that "N" is, if you will erase that if you will and put an "S" for south. That is headed south, is that correct?

[ROA 72] A. Yes, sir.

Q. No, excuse us. That should be west, is that correct?

A. Yes.

Q. That way the sun sets?

A. Yes, sir.

I was coming along Fayetteville Street right here and I got to right here. I don't know the name of this street. I think it is Bragg Street. Across from the highway, that pass 401. I came down here to the stop sign and I turned right and I was going down Holman Street then and as I had turned left, I saw John standing——

Q. Put a "J" there. Fine.

A. John standing here and the two children right here and this is the curb and I saw John coming toward the car. Out of the glance of my eye I saw him coming toward the car. So I stopped. I stopped in the middle of the road. John came to the car and snatched the car door open. I told him, "Don't snatch the car door open no more." and so he shut the——

John was my uncle. I had carried him other places before.

Q. Did he hitch rides with your frequently?

A. Every time I'd see him, I always stop. On this occasion I saw him and I stopped. He was already headed over toward the car. I stopped right here. I say in the middle of the road.

Q. Excuse me. Let me interrupt you a minute. There is a rectangle right above that road where it says "Branch". Does that rectangle represent anything that you recognize.

A. The apartment buildings over there. They are approximately the shape of the ones that are there.

And I told John to shut the door and he shut the car door and he told Jesse, said, "I don't want to fight you no more."

"Take him on home, Johnny." I said, "Okay."

[ROA 73] I testified earlier that that was big talk. And so I drive on off. I got right about in here. Jesse told me to let him out and I let him out. I said, "Let me take you home." He said, "No, let me out." I let him out and I drove on out around the curve. This is my aunt's apartment.

Charles McCoy—I live right here. An apartment upstairs. Apartment downstairs. One, two, three, four, five, six. This is the fourth one, fifth one. Charles McCoy stays in about the 7th or 8th apartment I think. I don't know Mrs. Raines good but I know her when I see her. I think she stays in the first apartment right here.

Q. All right. Do those light chalk marks beside of the road, do they represent approximately where the sidewalks are?

A. Yes, sir.

Q. And is there a sidewalk coming off perpendicular down here in front of the apartments that surrounds a big open space?

A. Yes, sir. Right here. That sidewalk goes up to the other apartments. They got a fence in between here. You have got to go all the way around to get to the trash can. This is the trash can right here. This is the building and I saw Jesse last—Jesse turned in between here.

Q. We will come back to that in a moment. Is that Highway 401 on the left?

A. Highway 401.

Q. Does it more or less form a barrier along this side of Walnut Terrace?

A. Barrier? It don't——

Q. The Street don't run directly into it at that point?

A. No. It is just an open space. A whole lot of

grass and that is all. It's kind of a limited access
[ROA 74] highway at that particular location.

I stopped right here in the middle of the block. I let Jesse out and I drove on around the curve. I think I parked somewhere along in here where the "X" is. I got out of the car and I was standing in the yard and they said Huck had shot John. Then I saw Huck going between—there is a fence right here, two trash cans and a fence. Got a foundation, you know, and lay bricks, then got a fence on top of the foundation, the fence I say. The trash can is too far over. The trash can is right here and fence right here and sidewalk right here. That is the sidewalk. Huck was down the sidewalk right here and got a little open path right here. A little open path. Just a small path that go up under the bridge. Leads to the bridge. I saw the defendant go—I saw him going down the sidewalk and that is all. I didn't see him go up under the bridge. I figured that the only place he could go was up under the bridge. I was standing in the yard at the time I saw him. The defendant was walking. He had a white T-shirt on and a pair of short pants.

When I came over to Wainut Terrace, the defendant had not asked me to help him find John Griffin. I wasn't looking for John. I didn't think the defendant was looking for John Griffin. I just gave him a ride to the terrace. Most of the time anybody that I know I usually give them a ride. I go out of the way and take people places.

Mr. BROOKS. All right. No further questions, Your Honor.

Mr. CALDER. I don't have any questions, Your Honor.

(Witness excused.)

Mr. BROOKS. May I approach the bench, Your Honor?

(Counsel approaches bench.)

[ROA 75] COURT. Members of the Jury, the defendant has asked for a brief break. If any of you would like to step into the jury room for about five minutes, you may do so.

(Short recess).

Jesse Thurman Fowler, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

Jesse Thurman Fowler is my name. I have lived at 1813 Liberty Place, Southgate Division for three years. I lived at that address on the 1st day of July, 1973. I am twenty-four. I was

born and raised in Raleigh but I left Raleigh in 1964. Every time I would leave I would go off and stay a while and come back. I lived in Washington, D.C., for a while in 1969, '70. I lived in Hillside Terrace Apartments where I worked. I was maintenance supervisor over the apartments.

I have been knowing John Griffin since about '60. I met him in Raleigh. I knew him well when I went to Washington, D.C. in 1969; we socialized together. I have never been fishing with John.

John came up to Washington and stayed with me for about three or four months. I got him a job at the same place I was working in General Maintenance—cleaning apartments and cutting grass. During the two years I have been back in Raleigh I have seen him several times off and on. I was under the impression that he lived in Goldsboro because he had told me that he had remarried and I have been with him to Goldsboro one time.

I hadn't seen John during the week preceding the Sunday, July 1st, 1973. I saw him July the 1st—I saw
[ROA 76] him that morning at the basketball court on Lenoir Street. I didn't usually see him at basketball courts. I used to see him at 522 Person Street a lot. That is where Sylvester Jones resides.

On Saturday, June 30, 1973, I visited the King's Lounge. I stopped through there a couple of times that day. As a matter of fact, I was working that day. I was driving a truck for Rhodes Furniture Company and I had a couple of trips out there that day and whenever I go through there I always stop my truck and go in the King's Lounge for a minute or two. The first time I stopped by there it was early that morning. About 10:00 o'clock because I had a pickup to make, a repossession to make in Kingwood Forest.

At that time I saw Sylvester there. I saw Wilburt [sic] Carter, Scotty, Doc, and Daniel Joyner. Just the general group that usually hangs there the majority of the time. We all talked about going fishing on Sunday. The group did not make any definite plans about going fishing, because everybody was kindly undecided about what they were going to do except Scotty and myself. And Doc said that he wanted to go but he didn't know exactly when he would be available to go. I visited King's Lounge twice more that day. The second time was the time we really seriously discussed the fact about going fish-

ing. The third visit I came through there was about 11:00 o'clock that night. I was just getting off work and parked the truck on the side of King's Lounge and I went in and saw the boys and asked them was they going fishing and Wilburt [sic] said he think he was going. Scotty said he knew he was going. So I told them I had to go home because I was just getting off work to see my wife and I probably would be back up there and see them on Sunday. We were going to meet at the King's Lounge to go fishing.

I got up on Sunday, July 1, 1973 about
[ROA 77] 8:30 or 9:00.

Q. And where did you go when got up?

A. I left and went by Wilbert Carter's house first and he wasn't there, but Scotty was there. He was a roommate of Wilbert's. They had some rum sitting on the table and Scotty asked me to go across the street to the Kwik Pik which is adjacent to the King's Lounge and get a coke and so, as I started out of the door, he threw me his keys and told me to look in the car and get the scotch. I went across the street and got a soda and some cigarettes and I saw Doc over by the store.

I asked Doc was he going fishing and he said that he couldn't go right then because he said his wife had to go out to the hospital or something. He said after his wife got back he would go fishing.

My fishing gear was over at Wilbert's house and so Doc came over there and I told him to take my fishing equipment and put it in his car and keep it. Doc did that. At that time I had a .38 revolver with me. I had it when I left that morning from my house. I knew we were going fishing. I knew we were going to start drinking before we went fishing. So that wouldn't give me any reason to go back home for anything.

We stayed over at Scotty's until 10:00 o'clock, I guess. I asked him to go over to Sylvester's house. We stopped by there and Sylvester wasn't home. Sylvester was gone to play basketball. We left there and stopped over by the basketball court in Kingwood Forest first and then we left. I stayed there for a couple of minutes or so. Ran a game and then we left there and went down on Lenoir Street where Sylvester was. And by the — when I got there, they was about to leave and I asked Sylvester
[ROA 78] was he still going fishing and I can't remember the direct words that he said but he said that he was going to his house and for us to follow.

So Scotty and myself, and I think it was somebody else in the car with us, we left there and went on over to Sylvester's house.

When we got there Sylvester, John Griffin, Puddin, Johnny Earl Brown, James Jones and few more people were already there.

When I got there, they had a good crap game going. Sylvester was playing. He was down on his knees. As a matter of fact, he had the dice. If I am not mistaken, he had the dice then. I kneeled down beside of Sylvester because I had a couple of dollars in my pocket. Sylvester lost the dice and he left his money laying there on the floor and he said he going to the bathroom and I was on the left-hand side of Sylvester. John was on the right-hand side of Sylvester. So when Sylvester got up and went to the bathroom, John took his foot and covered up the ten dollar bill and kind of slid it back toward him. So Sylvester came back in and he asked—the first thing he did was look down on the floor and he said—"All right, where is my ten dollar bill?" And so didn't nobody say anything. So I looked at John. I said, "John, go on and give the man his money." So John reached down and slid the ten dollar bill over to him and said, "Man, I ain't got to try to take nothing from Shorty. Anything I want, Shorty has got, he will give it to me". I said, "I know. You just had your foot on the man's money and heard him ask about it and you didn't say anything."

So he didn't say anything else to me. He didn't say anything in general to me. He was just running his mouth. I didn't pay it any more attention.

So I told Scotty—I said, "Let's break, man." So we went out and got in the car and left there and went out
[ROA 79] to the lounge. It was about—had to be about 2:00 o'clock, I guess. Scotty and I went in the club there and drank a few beers and I was sitting down at the table there and I seen my wife's car drive through the parking lot. It was a glass door. You could look right out the glass door. So I got up from the table and went outside and asked my wife and my sister-in-law if they wanted to drink some beer. So she acted like she had a case about something. So I told her, "Come on inside and drink some beer with me." She said, "Well, let me go home first and take the boys." So they went on down through the parking lot and I didn't go back inside then. I stood outside for a few minutes.

So her and my sister-in-law came back up the street. They came back up and ordered a pitcher of beer and put it on my table and sat there and drank about two or three more pitchers. Then my brother came up and told his wife he was ready to go. So they left. So I was sitting there in the chair nodding. I had crossed my legs and put them in the chair in front of me and I was nodding and my wife told me—she said, "Huck, don't go to sleep because I don't want to have to be bothered about trying to get somebody to help you down the street." So I said, "Okay."

So at that time I got up and walked to the bathroom and which I had been to the bathroom a couple of times before then. I got up and went to the bathroom then and came back and I saw Sylvester standing there. I went over to where he was. I said, "Are you going to let me have that dollar?" And he reached in his pocket and gave me the dollar. So I left from where he was and came down through—tables on this side and tables on this side. Came on down through the tables and John was sitting here——

[ROA 80] The bathroom was in the back. I was leaving the bathroom and coming back toward the front. I was seated near the front door. I passed by the table and John said, "The next time you pull that shit you did this morning—said, I am going to kick your ass." So I said, "Awe Man, you ain't going to do nothing to me." He said "Well, come on the outside then." So I bumped into the table and he got a couple of steps ahead of me. I went outside. I walked out the door. He hit me. Knocked me down. And then it happened so fast. So then he jumped down on me with his knee in my nose. Grabbed me around my throat. So I was just laying there on the ground. So Sylvester grabbed him and pulled him up off me and I got up and I attempted to go around the corner of the building and my wife says, "Huck, come inside and let me clean your nose up—clean your face." I said, "That is all right. I will be all right." So I stayed there for a minute and she said, "Come on. Let me clean your face." I said, "No, that is all right. I will be all right."

So I walked around the side of the building. Then I could just hear everybody around there talking, you know. So I was leaning up against the back of the building. I took my T-shirt what I had on and wiped my nose.

So then Charles Rogers came around the building in his car

and he said, "Huck"—He called me Huck. I looked up at him. I said, "Yes." He said, "You better go straight home. John Griffin is around there asking for a pistol." I did not actually hear John ask for the pistol. The only reason I knew was because Charles Rogers told me. So then I—I said to myself, well, I went over that way this morning. Seemed like he wanted to start something. I am going across the other side of town to my sister-in-law's house. This is my wife's sister that I am talking about now. She lives in Walnut Terrace. Her name is Queen Ester Williams.

[ROA 81] She lives on a dirt street in Walnut Terrace. She lives down in the back of Walnut Terrace. So I walked on up through there, on through the projects and by the time I go to the corner I caught a ride. Seen somebody stop on the corner, so I asked them to give me a ride. I don't know who it was. That is the corner I go to to hitchhike. Everybody does. I got in the car and they asked me what was wrong. I told him I just got in a fight and broke my nose. I was quite sure it was broke. And I didn't say anything else to him. So he took me on down as far as Lenoir Street and East. He was turning right heading north and I told him let me out right here and I walked across the street and I heard a horn blow, I think. Anyway I turned around and looked and I saw Johnny coming up Lenoir Street. So I threw my hand up at him and he pulled over to the side. So I shot across the street and I asked where was he going. He said he was going to Walnut Terrace. So I asked him, "Can I catch a ride?" He said, "Yes." Then he asked—he seen my shirt was bloody. He says, "What happened to you?" And I said, "Me and John Griffin got in a fight." And so then he started talking about—didn't say no more about that. He started talking about he was tired, his leg had been troubling him and had to go to the doctor the next week and then we went on over to Walnut Terrace. He was talking all the way. I asked him for a cigarette. He gave me a cigarette. Got to Walnut Terrace and went on down Holman Street and as we turned on Holman Street——

Q. Excuse me for a moment. At this point I will get you to come over to the blackboard—the green board and indicate how you proceeded.

A. We came on down Fayetteville Street to right here, Fayetteville, where Peacock Grocery made a left turn and went up

to the corner right here, which is the corner of
[ROA 82] Walnut and Holman and he made a right turn to right here, got here, we turned left and that was when John was standing on the corner over here. John Griffin was right along here about the point at Mrs. Raines' house. Probably right along in here.

Q. And how wide a lot is that between the end of the apartment and Holman Street?

A. It is large enough to play football in. We used to play football down there. He wasn't in the lot. He was on the sidewalk in front of the lot and like in front of Mrs. Raines' apartment.

So as we were turning the corner here, John evidently saw the car. He started waving the car down. So Johnny pulled up to right along here and stopped. When Johnny stopped the car, he ran over and pulled the car door and snatched it open. Other cars were parked along the south side of Branch Street at that point. There were about three or four cars on the other side of the street.

And so as the car stopped, John ran out to the car and snatched the car door open and he started running off at the mouth about "I don't want to fight you no more. So why don't you go on home." At that particular time, you know, sounded like he was saying, "Come on, man, I don't want no more trouble right now." You know. So then Johnny told him to close the door and he went on up the street until right along in here. Right along here. So I told Johnny to stop the car and let me out and he says "I will take you home." I knew he had been saying that he was having trouble with his leg and was tired and sleepy and was going back home and go to bed. I told him to stop right along in here, and he stopped it and I got out where I told him to stop, right here.

Q. Why did he stop there?

A. Because I could easily—there is a group
[ROA 83] of apartments sitting right here and right here and there used to be a pavement leading directly across through that field there, come right through there and go on up by the bridge. I used to live over in Walnut Terrace for six or seven years.

I got out of the car and stepped up on the curb, and Johnny Dolby pulled off and I looked back down the street and I saw John Griffin.

When I got out of the car, I was going across the street and going under that path and under the bridge on 401. I got out of the car and turned to go around the back of the car. That is when I saw Charles McCoy.

Q. If you will draw a little circle where you saw Charles McCoy. Draw it as dark as you can because it is going to be hard to see.

Q. Between that "C" and "H" in Branch?

A. Yes.

Q. And was he close to either of the cars that were parked in the street?

A. Yes, he was walking in the street like he was getting ready to cut—he was going like that. After I saw him—he went straight on up through here.

Q. All right. Just draw a line where you saw him go. All right, and when you turned, what did you see?

A. I saw John Griffin tipping behind him. John was crouched down tipping up the street behind him.

Q. Take several steps by how you mean tipping.

(Defendant demonstrates.)

I saw John behind Charles McCoy right here by the car.

Q. Put an "X" wherever you think you saw him. The "X" where you first saw John when you looked
[ROA 84] around?

A. John was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.

Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, "Nigger, I am going to make you use what you have got in your pocket."

That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned

around and looked like he started running back down the street. I put my gun down by my side and walked across the street here.

Q. Draw a zig-zag line where you walked.

A. I walked in the field right here. And when I got up on the curb over here I looked back and I didn't see John no more. So I saw that fence up there. I said, "I can't go through that way no more.["] So I came on out here and went on up through there.

Q. Draw a zig-zag line as far as you walked on that particular map on the blackboard. Show where you came on down here.

A. Came on down the sidewalk here. Down through there. That is a bridge right there under that goes up under 401 and goes on out through.

[ROA 85] When we first stopped at the corner of Holman and Branch Street, I was not out looking for John Griffin. I was not expecting to find him in Walnut Terrace, because I had just left him out at King's Lounge where I had been. Seem like it had been ten or fifteen minutes I had left him out at the King's Lounge. I was not eager to get into another fight with him. As far as I was concerned it was all over. From the way he said it at the car it was like it was all over with him.

At the time I stopped at Holman and Branch Street, I was not fearful of him. I was not of the view that I ought to avoid him.

When I got out of the car and started home, I was not expecting to see John Griffin anymore. When I saw him crouched down behind McCoy, I didn't know what to think at first because he was tipping behind him coming toward me, you know. And I didn't know what the purpose was in him tipping behind Charles. So the, he saw that I saw him, he pushed Charles and said—that is when he said he was going to make me use what I had in my pocket. I thought he was going to do something to me. I heard that he was trying to get a gun. All that came to my mind at that particular time, you know. I didn't know what to do. I just tried to keep him off me.

After I left Walnut Terrace, I went on through the railroad track and down the little dirt part of Wilmington Street and over to Mark Street, up Blount Street and made a phone call—called my wife. I told her I was cross town on Blount Street. I told her, I said, "I am not for sure but I think I shot John Griffin," and asked her to come and pick me up and she came

and picked me up. She took me back out to Southgate and my nerves were kind of shook up. I said, "Stop right here for a minute at King's Lounge." She said, "I'm

[ROA 86] going home." I said, "Well, drop me off." I went in and I went to the window—in the lounge I went to the window and got a mug of beer and came out and I left there. I went across the street to Wilbert Carter's house and told him I thought—so I told him—he was sleep, laying on the couch asleep. I told—I said, "Man, I think I shot John, John Griffin." And he said, "No, you ain't. You ain't did nothing like that." I said, "I don't know, I think I did." I told him to call to the hospital and see if somebody, if he was out there. So he said, "Naw, I am going and ask your wife something." Anyway I know I left out of the back door and Wilbert went over to the King's Lounge.

Q. He left you there alone while he went over to the King's Lounge?

A. Scotty was there. And I was sitting back there talking to Scotty and he went over to the King's Lounge and asked somebody and came back and said that the guy had been shot. At that time I didn't know if John was living or not. So I left out [sic] and I said if he is shot, I am going and turn myself in and I went down the street and stopped at Sam Perry's house, which is a bondsman. I told him that I think I shot John Griffin and I said I am going and turn myself in. Will you come and get me out on bond and he told me, he said, "John is dead." So I told him, I said, "Well, I am going downtown and turn myself in. Will you still get me out on bond?" He said, "I don't think they are going to give you a bond." I said, "They won't give me no bond tonight?" He said, "Naw." I said, "I am still going downtown and turn myself in." He said, if I get a bond to call me and he would come and get me out.

My house is right down the hill about a block from Wilbert's house. I walked from his house to my house. So I went home and I asked my wife to prepare me some-

[ROA 87] thing to eat. While she was fixing my plate I told her I was going to take a shower and I changed clothing and then I ate a little I told her I was ready. Told her I wanted to go see my mother first before I went downtown. So she took me to my brother's house to see my mother. I told my mother what happened. She asked me how did it happen. I told her that I saw John in Walnut Terrace and looked

like he was trying to jump on me again and that I shot up in the air and he kept on coming and I shot again and I think he was dead from what I heard. So I was going downtown and turn myself in. So she came with me and my brother, Lynwood Clack, came.

I do not remember what time I got downtown. It was pretty late because I sat out there at my brother's—I talked to my mother for a long time before I came because I knew if John was dead that I was going to be in jail for a while. So I wanted to talk to her before I came down here.

When I got downtown, Sylvester asked was Detective Williams working tonight, and somebody said, Naw he wasn't working tonight and I told them that I think the police was looking for me. They asked me what my name was. I told them. I told them they were looking for me I thought for shooting John Griffin. So they took me upstairs and by the time I got upstairs then Detective Williams came. He questioned me.

Q. Do you recall telling him what he read in the statement that he read back today?

A. Not word for word. I think it was pretty much the same thing.

I indicated that I used to live over in Walnut Terrace for about seven or eight years. It is within the confines of the border of the map that is on the board. It is on,
[ROA 88] right there at the corner of Holman Street. See the corner of Holman Street there at the bottom. Well right there at the end of the bottom line there is a street right there. I lived on the street right there. Right up the street about three doors. As you turn off the corner of Holman Street, I lived about three doors.

There is a basketball court right down to the left-hand side of where I used to live. With respect to this diagram the basketball court would be underneath everything on the right-hand side of Holman Street. It would be in the northwestern direction from the map that is shown on the board.

At the time I shot at John Griffin, at that particular time I really don't know if I had hit him because the only thing I saw looked like he turned and was running back down the street. Then I just turned around and walked on away. I couldn't really tell whether he was hurt or not. I didn't see

Charles McCoy anymore. The last time I saw him he was over on the sidewalk on the south side of Branch Street.

At the time of the fight over at the King's Lounge, I had no urge to use the gun on John Griffin. I don't think I would shoot anybody intentionally, not to kill them. I didn't think about shooting him because after I went around the side of the building, he didn't come around there. I figured it was all over, which then the fellow told me John was looking for a pistol, so I scatted on up [sic].

Mr. BROOKS. No further questions at this time, Your Honor.

Cross examination by Mr. CALDER:

I got the gun because we was going fishing and usually when we go fishing, I carry my pistol to kill snakes. I had it in my pocket the whole time I was playing basketball.
[ROA 89] I had it when they were playing dice over at Sylvester's house. I didn't go there intentionally to play dice. I had the gun with me at the King's Lounge at the different times I was there. Every time I was around John Griffin that day I had the gun. The handle won't [sic] sticking up. I had deep pockets. I dropped the gun in there and you really couldn't tell. If I sat down and crossed my legs and the handle sticks out, you could tell.

After I got beat up at the King's Lounge, I went straight to Walnut Terrace. I was going there to see Queen Ester Williams.

Q. And, in other words, you left the King's Lounge with the idea of going to see Mrs. Williams?

A. After I had gotten downtown, yes.

The fight at King's Lounge occurred about 6:30. I don't know if the shooting occurred at twenty minutes after eight.

Q. Why did it take you two hours to get from Rock Quarry Road to Walnut Terrace?

A. Evidentially [sic] the time must not be precise because I left the King's Lounge and other than stopping on the corner of Proctor and Rock Quarry Road catching a ride, from there to the corner of East and Lenoir, I went directly to Walnut Terrace. It took me approximately half an hour to get from King's Lounge to Walnut Terrace. When I left King's Lounge, John Griffin was still there.

So when Mrs. Raines said that John Griffin was in front of her house for at least half hour—I would have to contradict her. I got out of the car at the middle of the block there so that I could have the easiest walk back out of the terrace, out to

401. I wanted to leave the terrace even though
[ROA 90] I had spent all of this time in getting over there because Johnny popped up there. I said I am going on and leave down there. He is popping up like the devil everywhere I go. I am going back to my part of town. Maybe he won't get back over there by the time I get there. So I decided to go on back home. I didn't know that whenever John was in town on the weekends, he went over to see his children. Whenever I see John in town, John is over at Sylvester's house.

When I got out of the car, I couldn't walk directly across the street. I would have had to walk through the car. When Dolby pulled off, I started across the street and that is when I looked back down the street and I saw John Griffin behind Charles McCoy. I walked off the sidewalk back to the curb and John was gaining on me then. I can't definitely say that I did walk back down the street toward him, no. I don't remember walking past Jonice Griffin toward John Griffin. I don't recall stopping and talking to Paula Griffin. If I had stopped to talk to anybody in that length of time, John Griffin would have been right on my nose in that distance.

I had never had a fight with John Griffin before in my life. I have had a few fights before. I have been convicted of assault a couple of times. No, I wouldn't say it has been six times. No.

Q. All right, were you convicted for an assault on the 18th of November, 1966, assault with a deadly weapon?

Mr. BROOKS. Objection.

COURT. Overruled.

A. I am not going to say, yes, because I don't remember any dates directly and I am not going to say I was arrested in 1966 because I don't remember back that far. I was a minor during that time, I think.

[ROA 91] I don't remember being convicted no three times. I don't remember being arrested three times in no three months for assault. In 1968 I remember being convicted for fighting—simple assault. And then in 1972 I was—convicted of assault on a police officer. While in Washington, D.C., I was not convicted of anything.

We were still friends as far as I was concerned up to that day. At that particular time I was afraid for what he might have or might be intending to do after the statement that I heard that he had made. He asked my brother-in-law for a pistol. Well, my

sister's boyfriend for a pistol and said that he was going to kill me. The King's Lounge is walking distance from my house.

After John Griffin beat me up, I thought that I had a broken nose. I knew my nose was bleeding.

Q. All right, if you were so concerned about your nose, why didn't you go home and have it looked after or go to the hospital?

A. Wasn't important. I didn't think that much about it. It was just bleeding and I wiped the blood off it and wasn't really troubling me.

John Griffin said to me that he was going to make me use what I had in my pocket. He said that when I was on the street.

Q. Now how did he know that you had something in your pocket that you could use?

A. Evidently—he was right over me when I was in the car. Like he was going to snatch me out of the car right then and the gun was in my right-hand pocket and he was standing right there. I don't know if he could see the print of it then. I guess he did. He didn't crack the door. He snatched it all the way open.

I wouldn't know if he knew that I had
[ROA 92] a gun at the King's Lounge.

I testified that I was not sure that I told several people that I only thought that I had shot John Griffin. When I shot I did not have my arm straight out in front of me and I stated that I dropped the gun down and shot the second time.

After I shot and after he had turned his back and started in a different direction, I couldn't see him at that point. After I seen him turn around and he went down the hill, I couldn't see him anymore. Nobody was doing a whole lot of hollering and screaming. I didn't hear Mary Raines. She didn't hear herself I don't think. To my knowledge, no one was doing any hollering or screaming. I didn't see anyone running.

The only thing I saw was Charles McCoy and he continued to walk away. He continued to walk away just as if nothing had happened—just a gun fired in the air. I didn't even see the children anymore. I saw John pushed McCoy. It was almost as if you were tipping behind somebody and you step on their heel. How it will cause you to stumble—to push.

Q. Well, he was trying to hide out behind McCoy, wasn't he?

A. If that is the way you want to put it. He didn't see me

coming down the street. I was standing on the curb waiting for the car to pull off by the curb, waiting for the car to pull off so then I could—I walked on down the street around the back of the car. I had moved at least some distance from the place where I got out of the car to the place where I ultimately pulled the trigger. I had taken steps. I wasn't on the side of the street. I was in the street.

Q. You had moved west according to the map, you had moved back down toward Mrs. Raines' house?

[ROA 93] A. Right, in the street.

Q. And so you were walking toward John?

A. In the street, yes.

Q. You weren't walking away from him, were you?

A. I couldn't walk through the car and I wasn't going to walk around in front of the car. I can't rightly say how long that car sat there.

I didn't tell John Dolby anything about he wouldn't get in trouble. I said, go ahead up the street.

Q. Didn't you say what the officer said was your statement to the officer was about correct?

A. I said I couldn't say it was word for word or not.

I didn't tell the officer that I told Dolby to go ahead so he would not get in any trouble. I told him to stop the car and let me out and he said, "I will take you home," as he stated and I said, "That is all right." And he stopped the car. I got out of the car and shut the door and that is all that I said to him and that was all that he said to me. I did not know there was going to be trouble at that time. Like I said before, it was all over with.

When I got out of the car, like I said before, I stopped for Johnny to pull off with the car, pull the car off and I saw John coming toward me and I started down the street to go on across the street because it was a parked car on the other side of the street.

As I was walking down the street away from where I shot I did not see Christine Hall. No, I didn't look right at her and shake my head. The only person I saw was Charles McCoy and he continued to walk on the opposite side of the street in the same direction as I was going but only I cut off

[ROA 94] and went to the left and where he went, I don't know.

Q. Didn't you say that you came from the scene of the shooting across the street down this way and around the building?

A. Yes, right.

Q. All right, how were you able to see Charles McCoy walk on off but you couldn't see what was going on? Did you look halfway around and not all the way around, is that it?

A. If you standing beside of me, I can see. If you standing directly across the street and make a half turn with my head. [sic]

Q. All right, what did you mean or what were you doing when you threw up your arms after Johnny Dolby called out to you from his house?

A. He called me. He said, "Huck." I just said (demonstrating) I am gone. Just going on home. I was just leaving that part of town going back to where I thought maybe I wouldn't be involved with John anymore.

Why did it take me so long? I explained it. It won't hard for me to make my mind up about going do[illegible]own.

Q. You could have walked straight down [illegible]he Courthouse.

A. At the time I wasn't conscious of the fact that I had shot John because I didn't know. I made efforts to find out when I got home, when I got to Southgate.

I don't know how old John Griffin was. He wasn't my age. Griffin has children. I am not going to say they are almost as old as I am. I am twenty-four. Twenty-five next month. I wouldn't know how old his oldest is.

Q. Why did you feel it was necessary to use

[ROA 95] that gun instead of using your fists or running away; why did you have to use that gun?

A. Like I said, the first thing came to my mind John had been asking for a pistol and said that he was going to kill me. I just took my gun out and shot. If he had one to shoot me, he kept coming. So I shot the second time down and he turned around and I said, well must not have nothing and I turned around and walked off.

I didn't see a gun. When I saw John coming toward me behind Charles, I did not want to fight anymore. My intention was to get on away from there.

Q. Weren't you pretty hot about the fact that John Griffin had mashed up your nose, kneed you in the face, kicked you when he had you down on the ground in front of your friends down in front of King's Lounge, sort of humiliated you?

A. Nothing but a little fight. A fight that I lost. It won't [sic] the first one that I had lost. No, I did not pull the trigger a couple of times after the second shot.

After I crossed the street, got over on the sidewalk I just dropped the gun. That was the only gun I possessed.

Q. And yet you just toss it away, why is that?

A. It was worth a couple of dollars to someone that was down and out or who needed some money. I haven't never owned but one gun. I had shot that gun maybe one time before that day. I did not throw it away after that time. I just threw it down.

I told my wife that I thought I had shot John Griffin. King's Lounge is where I first stopped after she picked me up. My nerves was shook and I wanted a beer. I wasn't time conscious, so I didn't bother to look at any clock.

[ROA 96] Mr. CALDER. This is all the questions I have

Redirect by Mr. BROOKS:

When I had dinner that night, it was late in the night. I don't know what time it was. When I was over at Walnut Terrace it was already dusk. Almost dark. But it was light enough so you could still see a whole block without any difficulty. I think you probably could see two blocks. I can't remember definitely. By the time I had gotten to the King's Lounge, it had gotten dark. That was long enough for me to walk to Blount Street, pick up the phone, call my wife for her to come and pick me up. It won't quite dark when she picked me up.

Q. The solicitor asked you about any previous arrests and convictions for assault. He asked you about one incident in 1972. Do you recall the situation out of which that arrest occurred?

A. Yes.

Q. What had occurred on that occasion?

A. Police officer stopped me and was going to arrest me for public intoxication and I resisted and so he threw me in the car and signed a warrant for DUI, resisting arrest and assault on an officer and when I got to court, the resisting arrest and the DUI was thrown out. On the assault on the officer charge they gave me a hundred dollar fine and costs of the court.

When I went to see my mother I guess it was about 11:00 o'clock. I stayed out there for about a half hour, I guess, or so. I don't know. Anyway I stayed out there and talked to her for a while because I knew I was going to jail and I didn't want her

to have to come and see me in jail. I did not

[ROA 97] consider that fight during the afternoon to be something over which me and John would lose friendship. I did not know where John Griffin was in fact living at the time while he was in Raleigh. Before I went to see my mother, I was at my house long enough to take a bath, change clothes and eat. And then I went on over to see my mother.

After I visited with my mother, I went downtown and she joined me in going downtown to the police station.

Mr. BROOKS. No further questions, Your Honor.

Mr. CALDER. No recross, Your Honor.

COURT. All right.

(Witness excused.)

Mr. BROOKS. At this time, Your Honor, the defendant would like to call Rev. Robert Talley.

Rev. Robert Talley, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

Robert A. Talley is my name. I live at 617 Grantland Drive. I am Route Supervisor, A Dormitory of State University. I am a minister of the United Church of Christ with the North Carolina Association.

Q. Is that an ordained minister?

A. Not of a church. Evangelist. I work with all denominations. I have been knowing the defendant ever since he was a little boy. I would say at the age of—I call him a little boy because I always took him as one of mine. He was about the age of 14 or 15 years old. I first knew the defendant in Walnut Terrace—before we moved to Walnut Terrace but that is where he was living. I was living in Garner. All his family at-

tended my church on Rand Street, United

[ROA 98] Church of Christ in Garner. The defendant is not a member of that church but he attended that church with them as long as he was around them. I lived 1045 Walnut Street and he lived in the eleven hundred block of Walnut Street at that time. He come to my house very much. Just like my own children. Sat at my table and eat with us. Sleep with the children and stayed as long as he wanted. He always had great respect for our family any place I seen him out in the public. He was not prone to get into a lot of fights

not that I knew of. He did not cause a lot of trouble that I knew of.

He wasn't around his family much because—on account of his job situation. He wasn't around as often as they was. He attended church like his sisters and brothers. He made friends very readily. He assisted very much in church or neighborhood projects. He was real cooperative in that way. He was a friend. Any time he could lend a hand in the neighborhood in helping someone, he would do that and anything he could help out in and in assisting good relationship. He would, also, do that as far as I know. He was not much of a problem to his parents.

I continued to see him in Raleigh until he went away. He did go north for a while but he came back. When he returned, I saw him. He would always make way to my house whenever he got back in the State to let us know he was back and see us. Stay, take dinner with us. Stay as long as he wanted to.

I moved out of Walnut Terrace in 1968, I believe or '67. I wouldn't say that he moved out the same time we did but he did quickly after that but not the same time. I moved to Southgate, 1837 Rock Quarry Road. He moved 1813 Liberty Place on the street back of us. So we were still neighbors. I continued to see him.

[ROA 99]

As far as I know, he always had a right nice general reputation.

Mr. Brooks. I have no further questions, Your Honor.

Mr. Calder. Your Honor, I have no questions of this witness.

Court. All right, sir.

(Witness excused.)

Robert C. Monroe, being first duly sworn, testified as follows:

Direct examination by Mr. Brooks:

Robert C. Monroe is my name. I live at 1201 Glascock Street. That is—well Raleigh North Apartments. I am really not too familiar—I have been just here for a year and a half. And so it is on the far side over behind Mary Elizabeth Hospital. I am the Residence Manager of Southgate Apartments, Raleigh North Apartments and Mill Bank Apartments.

I know the defendant. He worked for me. He was working for Southgate Apartments as a maintenance man when I took this job and he was working at that time and he worked for me approximately six months and then we had a lay off of some of the men and so I had had that had worked than him and so I had to let him go. I went to work July the 15th of '72. So he

worked probably six months after that. He was a real good maintenance man and he did good work as far as I was concerned and I hated to lose him at that time. I never had any problems with him.

Q. Do you know anything about his general reputation?

A. No, sir. Just when he was working for me. Now I do know he must be a good provider for his family because he has always paid his rent real good. He was a tenant. His wife is still a tenant of mine now. He was a tenant at the time I came to manage the apartments.

[ROA 100]

Mr. Brooks. No further questions of this witness, Your Honor.

Mr. Calder. I have no questions.

Mr. Brooks. Your Honor, at this time, the defense rests.

Court. Any further evidence for the State, Mr. Calder?

Mr. Calder. No rebuttal evidence for the State, Your Honor.

Mr. Brooks. I would like to enter a motion as of nonsuit at this time.

Court. All right, motion denied and exception.

Mr. Brooks. Exception.

(Argument of defense and State followed.)

[ROA 100] Charge to the Jury

Members of the Jury, the defendant, Jesse Thurman Fowler, is charged in a bill of indictment with the capital felony of murder in the first degree. It being charged that on the first of July of this year he did unlawfully, willfully and feloniously of his malice aforethought did kill and murder one John Griffin.

To that charge the defendant has entered a plea of not guilty and upon that plea he is entitled to a trial by jury and it becomes your duty to find the facts from the evidence and apply to the facts as you find them to be the law as given to you in these instructions and thereby reach your verdict of guilt or innocence.

[ROA 101]

It is my duty to instruct you in the law arising upon the evidence and it is your duty to follow the instructions of the Court as to what the law is as it applies to this case, not what you may think the law is or ought to be or necessarily what the lawyers argue to you is their views of the law but you are to take the law as given to you in these

instructions and apply it to the facts as you find them to be and thereby reach your verdict.

As to what the facts are, it is for you and you alone to say from the evidence presented what you do find to be the facts. It is your duty to consider all of the evidence and to rely on your own recollection as to what the evidence was as it came from the witnesses and not the recollection either of the lawyers or of the Court as to what the evidence was. It is your duty to weigh and to consider the testimony of each witness, whether for the State or for the defendant, and determine the weight that you will give to that testimony and you may believe all, part or none of what a witness testifies to as you find that witness worthy or not worthy of belief and the weight to be given each witness' statements is for your determination.

In passing on the weight to be give a witness' testimony, you will take into consideration every circumstance which appears in the trial which would naturally bear on that person's truthfulness and the weight to be given his or her statement.

You will consider the manner and demeanor of a witness on the stand; the reasonableness or unreasonableness of the witness' testimony; the opportunity of the witness for seeing, hearing, knowing and remembering that concerning which he or she testified; the interest or lack of interest of a witness in the outcome of the case; any bias or prejudice
[ROA 102] which may appear; the character and reputation of a witness where that appears and every other circumstance which would naturally bear on a person's truthfulness and the weight to be given his or her statement and you will give to the testimony of each witness the weight that you find it is fairly entitled to.

The defendant by his plea of not guilty raises in his behalf a presumption of innocence. He is presumed to be innocent of the charge against him and the State must prove his guilt beyond a reasonable doubt.

I instruct you that the words "reasonable doubt" mean just what they say. A doubt based on reason and common sense arising out of the evidence in the case or the lack of evidence and not a vain, imaginary or fanciful doubt.

If after weighing and considering all of the evidence you are fully satisfied and entirely convinced or satisfied to a moral certainty of the truth of facts which constitute guilt of an offense, then you would be satisfied beyond a reasonable doubt

and it would be your duty to return a verdict of guilty of that offense. On the other hand, if after weighing and considering all of the evidence there is a doubt in your mind based on reason and common sense from the evidence or from the lack or insufficiency of the evidence of the truth of any fact which is necessary to constitute guilt, then you would have a reasonable doubt and it would be your duty to give the defendant the benefit of the doubt and find not guilty of that offense.

I instruct you that under the evidence in this case you may return one of four verdicts. You may return a verdict of guilty of murder in the first degree, or you may return a verdict of guilty of
[ROA 103] murder in the second degree, or you may return a verdict of guilty of voluntary manslaughter, or you may return a verdict of not guilty.

It is necessary that I define for you the essential elements or facts necessary to constitute each of those offenses. In North Carolina there are degrees of unlawful homocide [sic] recognized by our law. Namely, murder in the first degree; murder in the second degree and manslaughter. Manslaughter may be divided between voluntary and involuntary manslaughter and in this case you will not be concerned with the charge of involuntary manslaughter.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Manslaughter is the intentional or unlawful killing of a human being without malice and without premeditation and deliberation.

The presence in the one case of premeditation and deliberation and the absence in the other of either one or both of those elements is the distinction between murder in the first degree and murder in the second degree. The presence in the one case and the absence in the other of the element of malice is the distinction between murder in the second degree and manslaughter.

So an unlawful killing is manslaughter. An unlawful killing with malice is murder in the second degree. An unlawful killing with malice and with premeditation and deliberation is

murder in the first degree.

[ROA 104] For the State to be entitled to a conviction of the capital offense of murder in the first degree, it must prove beyond a reasonable doubt five things. First, that the defendant intentionally and with malice shot John Griffin with a deadly weapon; second, it must prove that the shooting was a proximate cause of the death of John Griffin. A proximate cause is a real, direct cause, a cause without which that death would not have occurred. Third, it must prove that the defendant intended to kill John Griffin; fourth, it must prove that he acted after premeditation; and fifth, it must prove that he acted with deliberation. If the State proves those five things beyond a reasonable doubt, the defendant would be guilty of murder in the first degree.

I have used the word 'premeditation' and 'deliberation'. Those elements must be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the inflicting of the fatal wound, or where the evidence shows that the killing is done in a brutal and ferocious manner.

Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence of the absence of provocation and all other circumstances under which the homicide was committed.

[ROA 105] In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after and all attending circumstances in determining whether the act shall be attributed to premeditated design or sudden impulse. Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over or reflecting upon it for any definite length of time but it means an intent to kill carried out by the accused in a cool state of blood in the furtherance of some fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose not under the influence of violent passion suddenly aroused by some lawful or just cause or legal provocation.

Premeditation means to think beforehand and when we say that a killing must be accompanied by deliberation and pre-

meditation it is meant that there must be a fixed purpose to kill which precedes the act of killing by some length of time, however short. If the purpose to kill is formed simultaneously with the killing, then there is no premeditation and deliberation and in that event, the homocide would not be murder in the first degree.

So those are the elements of the felony of murder in the first degree.

As I have already indicated, murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. So, it will be observed that malice is an essential ingredient of the crime of murder in the second degree. Malice includes hate, ill will or spite. It also means that condition of the mind to prompt a person intentionally to take the life of another without just cause, excuse or justification. Malice may be shown by evidence of hatred, ill will or dislike. And malice is implied in law from an intentional killing with a deadly weapon. A .38

[ROA 106] caliber pistol is a deadly weapon within the meaning of the law. Malice may be general or particular and it may be express or implied. General malice is wickedness, a disposition to do wrong regardless of social duty and fatally bent on mischief.

Particular malice is ill will or grudge to do revenge on a particular person. Express malice would exist where there is an intent to kill or cause some great bodily harm in the mind of a person evidenced by either threats beforehand or declarations afterward or by other circumstances showing directly that such intent really existed in the mind of the person charged with the crime at the commission of the crime.

When there is no direct evidence of such intent but the fact of the killing is surrounded by such circumstances as to carry a plain indication of some wicked intent of an aggravate l nature, then the law in such case implies malice.

And malice is implied where one intentionally inflicts a wound which proximately causes the death of another.

There is a distinction, Members of the Jury, between the intent to kill, which is an element of murder in the first degree, and the intentional infliction of a wound which proximately causes death. For murder in the second degree to exist it is not required that there be a fixed intent to kill but if one intentionally does an act such as shooting another one, under such circumstances that death might reasonably be expected from

that shooting and death does proximately re-
[ROA 107] sult or directly result from that shooting, that is an intentional killing within the meaning of murder in the second degree. And when it is admitted or established by the evidence that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against the defendant. First, that the killing was unlawful; second, that it was done with malice. And an unlawful killing with malice is murder in the second degree.

Where those facts are proven, that is an intentional killing with a deadly weapon, the burden then rests upon the defendant to establish facts which would mitigate the offense to manslaughter or justify it all together. This burden on the defendant is not to prove those facts beyond a reasonable doubt but simply to the satisfaction of the jury unless they arise out of evidence from the State. So if an intentional killing with a deadly weapon is proved, nothing else appearing, that would be second degree murder. The law implying malice under those circumstances.

The defendant may rebut the presumption of malice by showing to your satisfaction the facts which raise adequate provocation or may justify the killing all together by showing of facts which satisfy you that he acted in self-defense.

So those are the essential elements or facts necessary to prove the charge of murder in the second degree.

As I have said, manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Voluntary manslaughter is an intentional killing in sudden passion or heat of blood caused by something which the law
recognizes as adequate provocation. The most
[ROA 108] common instance of voluntary manslaughter is where one unlawfully kills another by reason of anger suddenly aroused by provocation which the law recognizes as adequate. Where anger is naturally aroused by that provocation and the killing is done before time has elapsed for passion to subside and for reason to resume control, in such case the anger so aroused would displace malice and reduce the unlawful killing to the grade of manslaughter.

So if an act of killing, though intentional, be committed under the influence of passion or in the heat of blood produced by an adequate or reasonable provocation and before reasonable time has elapsed for the blood to cool and reason to resume control and is the result of temporary excitement by which the

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control of one's reason is disturbed, not from any wickedness of heart or cruelty or recklessness of disposition or desire for revenge, then the law recognizes the offense as a less serious nature then murder and gives it the designation of manslaughter.

The rule is that to reduce an intentional killing from murder in the second degree to manslaughter by reason of adequate provocation is [sic] that a person's reason should be at the time of the act so disturbed or obscured by passion to the extent which might render an ordinary person of fair, average disposition to act rationally and without due deliberation or reflection and from passion rather than judgment [sic].

The legal provocation which will reduce murder in the second degree to manslaughter must be more than mere words. As
language, however abusive, neither excuses or
[ROA 109] mitigates a killing. The law does not recognize circumstances as legal provocation which in themselves do not amount to an assault or a threatened assault.

If the State has satisfied you beyond a reasonable doubt that the defendant intentionally shot John Griffin and that that shooting proximately caused his death, then to negative malice and reduce the crime to manslaughter the defendant must satisfy you of three things: First, that he acted in the heat of passion. This does not mean mere anger. It means that his state of mind was at the time so violent as to overcome his reason, so much that he could not think to the extent necessary to form a deliberate purpose and control his actions.

Second, he must satisfy you that this passion was produced by acts of John Griffin which the law regards as adequate provocation.

And this would consist of anything which had a natural tendency to produce such passion in a person of average mind and disposition.

Under provocation, assault by John Griffin on the defendant would be such provocation or a threatened assault by John Griffin on the defendant would be considered such provocation. Thirdly, the defendant must satisfy you that the acts of provocation took place—Correct that.

Thirdly, the defendant must satisfy you that the killing took place so soon after the provocation that passion of an average
mind—that the passion of a person of average
[ROA 110] mind and disposition would not have cooled.
If although you are satisfied beyond a rea-

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sonable doubt of an intentional killing by the defendant of John Griffin with a deadly weapon, if you are satisfied not beyond a reasonable doubt but merely satisfied of those three things, then the defendant would be guilty of voluntary manslaughter.

To justify a killing by reason of self-defense the defendant must satisfy you of four things; that is, if you have found beyond a reasonable doubt that he intentionally shot John Griffin and that proximately caused John Griffin's death, then the defendant must satisfy you of four things to justify such killing on the grounds of self-defense.

First, that it appeared to him and he believed it to be necessary to shoot John Griffin in order to save himself from death or great bodily harm.

Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

It is for the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to John Griffin, the fierce-

[ROA 111] ness of the assault, if any, being made upon the defendant, whether or not John Griffin had a weapon in his possession, and the reputation, if any, of John Griffin for danger and violence.

Thirdly, the defendant must satisfy you that he was not the aggressor. If he voluntarily and without provocation entered the fight, then he was the aggressor. And one enters—Strike that.

Fourthly, the defendant must satisfy you—if you find an intentional killing with a deadly weapon, he must satisfy you that he did not use excessive force, that is, more force than reasonably appeared to be necessary to him at the time. Again, it is for you, the jury to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time. If you find those four facts to exist, if you are so satisfied, then he would not be guilty, of any offense. If, although he otherwise acted in self-defense, he used excessive force—and I will define that to you later—or he was the aggressor, although he had no murderous intent at the

time of entering the fight, then he would be guilty of voluntary manslaughter.

The State in this case contends that you should be satisfied beyond a reasonable doubt of the defendant's guilt of murder in the first degree, or if not of that, one of the included offenses.

The State has offered evidence tending to show that on the first of July of this year, a Sunday, that John Griffin was in the Walnut Terrace area visiting his children, he being separated from the mother of the children, but he was visiting with

two of his children in the neighborhood; that

[ROA 112] the defendant appeared in the neighborhood in an automobile with John Dolby; that there was some movement by John Griffin to the automobile and some words exchanged; that Griffin left the automobile and the automobile moved on down the road; that the defendant got out of the automobile, came back in the direction of John Griffin and he had a pistol; that he shot John Griffin; that he later died as a result of that wound.

The State's evidence tends to show that the parties had been together earlier in the day; that there had been a fight in which John Griffin had broken or blooded the nose of the defendant; that it occurred some three or four hours before the shooting in Walnut Terrace.

The State's evidence tends to show that the defendant got a ride with Dolby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Dolby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon; was with his children or near his children and that he did not do any act or commit any act which would constitute provocation which would reduce the offense to manslaughter and that he did not do any act which would give a person reasonable grounds to believe that he was going to suffer any bodily harm whatsoever and particularly any serious bodily harm from John Griffin.

The State contends that any assault or fight between the parties earlier was so long before that any passion arising from

that would have subsided; and the State con-

[ROA 113] tends that the defendant, because he had been humiliated or because of a feeling of revenge, went to the scene to deliberately shoot John Griffin, and did.

The State contends that the defendant is guilty of murder in the first degree.

The State contends the surrounding circumstances are such as to infer both premeditation and deliberation and an intentional killing with a deadly weapon without provocation or legal excuse.

The State has offered evidence tending to show that in the opinion of the pathologist who examined John Griffin at the morgue of Wake Memorial Hospital that the cause of his death was a bullet wound that penetrated the abdominal aorta and died from bleeding as a result of that wound.

The State's evidence tends to show that the defendant at Walnut Terrace area did get out of an automobile and come back toward John Griffin; that he asked one of the children where her father was and as he was approaching John Griffin, going in his direction, Griffin came behind the witness McCoy attempting to hide or got behind the witness McCoy for sometime and that the defendant moved to one side and shot him.

The State contends that you should find the defendant guilty of murder in the first degree, or if not, should find him guilty of murder in the second degree beyond a reasonable doubt.

The defendant contends that he is not guilty. The defendant by his plea of not guilty denies the charge and each essential element of the offense. He denies the sufficiency of the State's evidence to satisfy you beyond a reasonable doubt of his guilt of any of the offenses.

[ROA 114] The defendant contends that the State's evidence does not show premeditation and deliberation and that you should not find those elements to exist and should not find him guilty of murder in the first degree. He contends that if you find that he did intentionally shoot Griffin and thereby cause his death that it was as a result of adequate provocation and further was justified by reason of self-defense.

The defendant has offered evidence tending to show that he had planned with friends to go fishing either on the Saturday or on Sunday. The time was not definite but that the plans were still on as far as the defendant knew and that it was the custom of the defendant and others with whom he fished to carry a gun along to shoot snakes and for that reason the defendant had the .38 pistol with him on this date.

His evidence tends to show that sometime in the afternoon at the King's Lounge, after an incident at a dice game at which

John Griffin appeared to get mad with the defendant, words were had at the King's Lounge about that incident; that Griffin asked the defendant outside and jumped on him before he had a chance to get outside and to protect himself and assaulted him so that he broke his nose.

The defendant's evidence tends to show that sometime after that, he contends a fairly brief time, that he was actually starting to visit a friend and got a ride with Dolby; that he had no intention of looking for John Griffin, had no idea that he would be at Walnut Terrace but was going there for other purposes; that he did go with Dolby to

[ROA 115] Walnut Terrace.

His evidence tends to show that before leaving the King's Lounge there was communicated to him a threat on the part of Griffin to get a gun and to shoot him; and his evidence tends to show that when they arrived at Walnut Terrace, that Griffin jerked open the door of the car, had some words about the previous incident and at Dolby's demand, Griffin shut the door and that they drove off and that he, the defendant, realizing that Dolby had to go home, decided that he would get out and leave the area and his evidence tends to show that as he got out of the automobile and was waiting for it to pass on he saw Griffin slipping up the street behind McCoy in his direction and he contends by reason of the past assault, by reason of the information that he had about Griffin's reputation and character and about his statement that he would get a gun, or that he tried to get a gun, that he had reasonable grounds to believe under those circumstances that he was about to suffer death or great bodily harm at the hands of Griffin.

He shot once in warning and then shot once in the direction of Griffin; that he left without seeing what had happened, except that Griffin appeared to go back the other way; that he disposed of the gun and went home and after making some efforts and inquiries about Griffin and finding that he was dead, he gave himself up at the Magistrate's Office and made statements as to what had happened.

The defendant contends that he was justified by reason of self-defense in any shooting and should not be found guilty of any criminal offense arising out of the death of John Griffin.

As I have said, Members of the Jury, I have

[ROA 116] given you those things which must be shown to establish a defense of self-defense. It is neces-

sary that I give you some more statements of the law with reference to self-defense. One who acts in self-defense when it is necessary to prevent some bodily harm to himself—one may act in self-defense when it is not necessary to prevent bodily harm to himself if he believes it to be necessary and has reasonable grounds for that belief. One may only kill in defense of himself when it is necessary to prevent death or great bodily harm or even though it is actually not necessary to prevent death or great bodily harm if he believes it to be necessary to and has reasonable grounds for that belief. A jury, and not the person charged, is to determine the reasonableness of the belief upon which he acted but the jury must judge the reasonableness of this belief by the facts and circumstances as they appeared to the defendant at the time of the alleged killing.

If a person is without fault and a felonious assault is made upon him, that is, an assault with an apparent intent to kill or do serious bodily harm, then he is not required to retreat but may stand his ground and if he kills his assailant and it was necessary to do so or reasonably appeared necessary for him to do so to save his life or to protect himself from great bodily harm, that would be excusable homicide. Ordinarily the law does not justify the use of a deadly weapon to repel a simple assault; that is, an assault without the apparent intent to kill or do serious bodily harm.

And if one kills another in repelling a simple assault under ordinary circumstances he would be guilty of voluntary manslaughter at least.

[ROA 117] This rule does not apply, however, where the jury finds that the use of such a weapon was or reasonably appeared to be necessary to save the person assaulted from great bodily harm. The right of self-defense may in acceptable circumstances arise from the fierceness of the assault, the position of the parties, differences between their relative size and strength, or from facts known to the defendant which give him reasonable apprehension that he is about to suffer death or great bodily harm although no deadly weapon is apparent.

If a simple or an assault without apparent intent to do serious bodily harm is made on a person, he is required to retreat as far as possible before he may kill his adversary in self-defense. If there is any way of escape open to him, he may not stand his ground and kill his adversary. And in the exercise of the right

of self-defense more force must not be used than is reasonably necessary under the circumstances and if excessive force is used, the defendant would be guilty of voluntary manslaughter. The means for force which a person is justified in using in self-defense depends upon the circumstances of the attack and in no case exceeds the bounds of defense or prevention but if the one attacked uses only such force as reasonably appears necessary to him under the circumstances to repel the attack and save himself from death or great bodily harm, it would be justifiable or excusable homicide. The question for the jury to decide is whether the defendant, if he used the force which resulted in the death of the deceased, had under all the circumstanes reasonable cause to believe and did believe that this amount of force was necessary to protect himself from impending danger or great bodily harm.

[ROA 118] The defendant contends that he had been wrongfully assaulted by Griffin; that he had reason to believe that Griffin might have armed himself, that Griffin appeared to be advancing upon him behind the shield of McCoy and that under those circumstances he did have reasonable grounds to believe and did believe that he was about to suffer such serious bodily harm from Griffin that only the use of dead force, that is, a shooting, would protect himself from great bodily harm.

He contends that you should be satisfied of those facts and should find him not guilty of the charge, or of any charge against him.

The State contends upon the plea of self-defense that there was no evidence that Griffin was at this time making any assault on the defendant or threatening him with any assault; that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm and the State contends that the right of self-defense did not exist but the State contends on the other hand that it was a deliberate and planned killing on the part of the defendant and unjustified by any legal grounds and unprovoked in any manner which would reduce it to any lesser offense or justify it all together.

Members of the Jury, there has been some evidence tending to show that the deceased, John Griffin, had some reputation for

danger and violence. He was believed to be a person who would commit dangerous acts. One witness expressed "Will jump on you from behind." Such evidence is evidence which you will consider in determining the reasonableness of any apprehension under which the defendant acted. Likewise, any evidence of threats of violence communicated to the defendant as having been made by the deceased is evidence which you will consider in determining the reasonableness of any apprehension under which he acted.

[ROA 119]

The defendant has offered evidence, Members of the Jury, as to his general reputation in the community. Certain witnesses testifying to their knowledge his reputation was good in the area where they knew him.

The State in cross examination of the defendant has brought out certain circumstances relating to prior criminal offenses of the defendant. Where a defendant testifies as a witness and offers evidence as to his reputation for good character, the jury may consider that in two aspects—is to consider it in two aspects: One, the defendant's character is a circumstance bearing upon the weight to be given his testimony as a witness along with all other circumstances which may bear upon that.

Two, where he offers evidence of his good character the evidence is also to be considered by you as substantive evidence bearing directly upon his guilt or innocence of the charge upon the theory that a person of good character and reputation is unlikely to do a wrongful or criminal act inconsistent with his reputation and character.

Any evidence offered by the State as to the defendant's conviction of criminal offenses in the past is evidence to be considered by you only in determining whether he was a person of good character and reputation.

Members of the jury, in these instructions I have only referred to so much of the evidence as appeared proper to give you the rulings of law applying in the case. I have not attempted to try to summarize or recapitulate the testimony of each witness or to refer to all of the evidence. My failure to mention some part of the evidence does not mean that it should not be considered but you should consider all of the evidence in arriving at your verdict.

[ROA 120]

My statement of what some of the evidence may tend to show, either in behalf of the State or of the defendant, is in

no way an expression as to whether that has been proved to be a fact or not, it being entirely for your determination and not mine what has been proved to be a fact in the case and you should not concern yourself with the judge's opinion as to what the evidence, what the facts are, or as to what your verdict should be in arriving at a verdict.

And my statement of what the contentions of the parties may be, the State or of the defendant, is in no way intended as a limitation upon any of the contentions which you should consider in arriving at your verdict. You should consider every contention, both for the State and for the defendant, which fairly arises in your mind upon the evidence in reaching a verdict whether argued by counsel or not or mentioned in these instructions or not.

I instruct you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about the first of July of this year the defendant, Jesse Thurman Fowler, did intentionally and without justification or excuse shoot John Griffin with a pistol and thereby proximately caused his death and that Jesse Thurman Fowler then intended to kill John Griffin and that he acted with malice and premeditation and deliberation, if you find all of those facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the first degree.

[ROA 121]

If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon that charge if you find from the evidence beyond a reasonable doubt that on or about the first of July of 1973, Jesse Fowler did intentionally and with malice shoot John Griffin with a pistol thereby proximately causing his death, then nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree. However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the second degree.

If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And upon that charge if you find from the evidence beyond a reasonable doubt that he did on the day

be required to deliberate. The twelve of you may retire to the jury room and make up your verdict.

(Jury retires for deliberation at 2:30 p.m.)

(Jury returns to courtroom at 3:30 p.m.)

COURT. Let the jury come into their seats.

(Jury takes seat in jury box.)

COURT. You have reached a verdict, ladies and gentlemen?

FOREMAN. Yes, sir.

COURT. You may proceed to take the verdict.

CLERK. Ladies and gentlemen, answer to your names.

(Panel of twelve answer to their names.)

CLERK. Have you all agreed upon your verdict?

FOREMAN. Yes, ma'am.

CLERK. Who will speak for you?

FOREMAN. I will speak.

CLERK. Please stand. Jesse Thurman Fowler, stand up. Ladies and gentlemen, look upon the prisoner, what say you for your verdict? Do you find the defendant, Jesse Thurman Fowler, guilty of murder in the first degree, as charged; or guilty of murder in the second degree; or guilty of voluntary manslaughter; or not guilty?

[ROA 124]

FOREMAN. We, the jury, find the verdict to be guilty of first degree murder as charged unanimously.

CLERK. Harken into [sic] your verdict as the Court recordeth. You say that Jesse Thurman Fowler is guilty of murder in the first degree as charged. So say you all?

Mr. BROOKS. Your Honor, we move that the jury be polled.

COURT. Members of the jury, the defendant has asked that the jury be polled, which means that each of you will be asked individually some questions about your verdict. Please answer to your names and answer the Clerk's questions audibly.

(Clerk polled the jury individually and all assented to verdict as returned by the foreman in open court.)

Mr. BROOKS. At this time I would like to move that the verdict be set aside as against the weight of the evidence.

COURT. Motion denied and exception.

Mr. BROOKS. Yes, sir.

COURT. Any other motion prior to judgment?

Mr. BROOKS. I believe, that is all at this time, Your Honor.

COURT. Judgment will not be pronounced today but will be pronounced at 9:30 tomorrow morning. The defendant is remanded to custody until that time.

in question shoot John Griffin proximately causing his death but you are satisfied that he killed him without malice in the heat of sudden passion lawfully aroused by adequate provocation, as I have defined that to you, or if you find—that is, satisfied, not beyond a reasonable doubt but satisfied that although he believed that it was necessary to shoot John Griffin to protect himself, he did not have reasonable ground for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Griffin and thereby proximately caused his death, if you are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe that he was about to suffer death or serious bodily harm at the hands of John Griffin, and under those circumstances he used only such force as reasonably appeared necessary under the circumstances, then he would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty.

[ROA 122]

Members of the Jury, your verdict must be unanimous. All twelve of you must agree upon a verdict. In the jury room you should select a foreman to lead your discussion and to report for you and when you have reached a verdict, you will indicate it by knocking. The Court will receive you and the clerk will take the verdict. The foreman stating what your findings are.

Members of the Jury, since it is nearly the lunch hour we will recess for lunch before beginning your deliberation. Come back at 2:30 and you will, of course, carefully observe the caution you have had before during the lunch hour. Since you will not be sent out until after lunch, the alternate will remain under the same instructions and will come back after lunch. If at that time all twelve of the original jurors are still here and healthy, the alternate will be excused, but you remain for now as a member of the jury. We will take a recess until 2:30.

[ROA 123] [VERDICT]

9/26/73 p.m.

COURT. Members of the jury, since the twelve of you, who are original jurors, have made it to this point, the alternate will not

JUDGMENT

9–27–63 a.m.

COURT. Are you ready to pray judgment?

Mr. CALDER. Yes, sir. Case number 73–CR–41907. Jesse Thurman Fowler. The State would pray judgment at this time.

[ROA 125]

COURT. Anything else in behalf of the defendant?

Mr. BROOKS. Your Honor, at this time, if it please the Court, we would like to enter a motion in arrest of judgment.

COURT. Any particular grounds, Mr. Brooks?

Mr. BROOKS. No, sir, not to be stated now.

COURT. Motion is denied and exception for the defendant.

Mr. Fowler, would you stand up. Mr. Fowler, you have been tried on good and competent evidence. Saw no signs of anybody out to get you or anybody deliberately wanting to lie on you or in anyway tell anything that didn't appear to them to be the truth. The evidence was strong and sufficient for the jury to find that you were guilty of murder in the first degree and it has so found. The penalty is extreme and the purpose of having any penalty and especially the death penalty is to try to teach others that the kind of life you chose to live, and particularly the act that you finally did, will not be accepted by society. The word has got to get out through the lobby of the courthouse and King's Lounge and everywhere else that people that are inclined to be free with weapons and free with other people's lives that society is not going to permit this kind of conduct. So you do face the extreme penalty provided by law for murder in the first degree. Before sentence is pronounced, is there anything that you want to say that hadn't been said for you?

Mr. FOWLER. Naw.

COURT. Sir?

Mr. FOWLER. No, sir.

COURT. Jesse Thurman Fowler, you have been indicted, tried and convicted by a jury of your county of the murder in the first degree of one John Griffin. The law prescribes in section 14–17 of the General Statutes of North Carolina that the punishment for your crime is death. The judgment of the Court therefore is that you be remanded to the Common Jail of Wake County and there remain until the adjournment of this court. IT IS ORDERED that you be conveyed by the High Sheriff of Wake

[ROA 126]

County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and IT IS FURTHER ORDERED AND ADJUDGED AND DECREED that you remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that you be taken by the said Warden to the place provided for execution in said prison; and IT IS FURTHER ORDERED AND ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take you the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause you to inhale lethal gas of sufficient quantity to cause death to be administered to you and to continue said inhaling of said lethal gas by you until your death.

Anything in behalf of the defendant, Mr. Brooks?

Mr. BROOKS. No, Your Honor. We would like to enter notice of appeal.

COURT. The record will show that notice of appeal was given in open court; further notice is waived. The Court in its discretion denies appearance bond. Has he heretofore been found indigent, Mr. Brooks?

Mr. BROOKS. No, sir. I am retained by the family.

COURT. You are employed. The defendant is allowed 75 days to perfect and serve case on appeal. The solicitor is allowed 25 days thereafter for countercase or exceptions. It will be ordered that the defendant having been convicted of the capital felony that he be committed to the State Prison for safekeeping pending his appeal. Appeal bond is set at $200.00.

[ROA 127]

Mr. BROOKS. Yes, Your Honor. Thank you.

COURT. He is remanded to your custody, Mr. Sheriff.

Finis.

[ROA 127] GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

* * * * *

[R 131] 9. The imposition and the carrying out of the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 24 of the Constitution of the State of North Carolina.

Exceptions Nos. 2 (R p 9), 3 (R p 11), 4 (R p 12), 5 and 6 (R p 14).

STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER

Supreme Court of North Carolina, No. 34, April 10, 1974
(285 N.C. 90, 203 S.E. 2d 803)

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of John Griffin. Defendant appeals from a judgment imposing a sentence of death.

The State's evidence tends to show that around 6:30 or 7:00 o'clock on the evening of 1 July 1973 John Griffin, the deceased, was with his two children in front of a neighbor's house at 1300 Branch Street in Raleigh, North Carolina. While Griffin was visiting with the neighbor, a car in which defendant was a passenger drove up and stopped fairly close to where Griffin was standing. Griffin walked over to the car, snatched the car door open, and said to defendant, "I don't want to fight you no more. I want you to go on home." Griffin then turned to the driver, Johnny Fraizer Dolby, and asked him to take defendant home, and Dolby agreed to do so. After Dolby had driven only a short distance down the street, defendant insisted that he stop the car and let him out. Dolby complied with defendant's request, and defendant got out of the car and started walking toward Griffin. When the two were fairly close, defendant pulled a pistol and shot at Griffin twice, hitting him once in the stomach. Griffin fell and defendant left the scene of the shooting and

went home. At the time defendant shot Griffin, Griffin had no weapon of any kind in his hand and no weapon was found on or near his body after the shooting.

The police were called and Griffin was taken to a hospital where later that night he died as a result of the gunshot wound. A few hours after the shooting, defendant, upon the urging of his wife and a friend, went to the Raleigh Police Department to explain what had happened. At the police station defendant was informed of his constitutional rights and indicated that he understood them and that he did not want an attorney present. He also signed a waiver of rights form that was introduced at trial. Defendant said that he wanted the police to know that he was drunk when he shot Griffin. According to Detective D. C. Williams of the Raleigh Police Department, defendant explained to the police that he had gotten drunk on 30 June 1973 and had gotten up the next morning, 1 July 1973, and started drinking again. Defendant's statement to the police also revealed that on 1 July 1973 defendant had gone over to Sylvester Jones' house where a crap game was in progress. There defendant and Griffin got into an argument about a ten dollar bill, but nothing happened as a result of this argument. Around 6 p.m. defendant left the game and went to King's Lounge on Rock Quarry Road. Griffin arrived at the Lounge later, and shortly after Griffin's arrival he and defendant resumed their argument about the ten dollar bill. Griffin asked defendant to come outside with him, and as defendant was walking out, Griffin hit him in the nose, knocking defendant down and breaking his nose. Defendant told the police that at this time he had a .38 caliber pistol in his pocket. He left the King's Lounge and went to his home for awhile, and then decided to catch a ride and go see a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, he saw Griffin, and Griffin came over to the car and wanted to fight defendant again. Defendant then persuaded Dolby, the driver, to let him out so that Dolby would not get into any trouble. When defendant got out he started walking away but Griffin came toward him. Defendant shot at him but missed, then shot again and hit him.

All the State's witnesses testified that although defendant's eyes were bloodshot at the time of the shooting incident and when he made his statement, he appeared to be in complete control of his mental and physical faculties and was not drunk.

Much of the defendant's evidence tended to corroborate the statement defendant had given to the police on the night following the shooting, except as to that part when he stated he was drunk. His evidence further tended to show that he and some of his friends had planned to go fishing on the day of the shooting, and that it was defendant's custom to carry a pistol with him when he went fishing to shoot snakes; that he had his .38 caliber pistol with him all day for that purpose and had not gotten it after his scuffle with Griffin at the King's Lounge. Defendant also testified that immediately after his fight with Griffin at the King's Lounge, Charles Gene Rogers came up to him and told him, "Man, you better go ahead on because John Griffin is trying to get a pistol to kill you." Rogers corroborated this testimony.

Defendant testified concerning the events leading up to the shooting substantially as follows: Before his fight with Griffin he had been drinking some beer at the King's Lounge. Following the fight defendant decided to go over to an apartment complex known as Walnut Terrace to see his sister-in-law. At the time defendant did not know that Griffin would be in the area, and he was not out looking for Griffin. He got two rides to the complex, the last being with Johnny Fraizer Dolby. When Dolby got to the Walnut Terrace area, he and defendant saw Griffin on the street. Griffin came over to the car, snatched the car door open and told defendant, "I don't want to fight you no more. So why don't you go on home." Griffin then shut the car door, and Dolby drove down the street after telling defendant that he would take him home. After the car had gone only a short distance, defendant told Dolby to stop the car and let him out. Defendant testified that he did this because he wanted to leave the area the "easiest" way possible because Griffin had "popped up" in the area. Defendant got out of the car and started crossing the street. At this point he looked down the street and saw Griffin crouched down behind Charles McCoy. McCoy was walking up the street in the direction of defendant, and Griffin was "crouched down tipping up the street behind" McCoy. Suddenly, Griffin pushed McCoy out of the way so that Griffin and defendant were facing each other. Then Griffin said, "Nigger, I am going to make you use what you have got in your pocket." At this point defendant got his pistol out of his pocket and shot it once in the air hoping Griffin would turn back. Griffin did not turn back and so defendant shot at him a

second time, this time hitting him in the stomach. Defendant stated that at the time he shot Griffin he was thinking about having heard that Griffin was looking for a gun and that he was just trying to keep Griffin off of him; he did not shoot to kill him.

Atty. Gen. Robert Morgan and Asst. Atty. Gen. Sidney S. Eagles, Jr., Raleigh, for the State.

Chambers, Stein, Ferguson & Lanning by Charles L. Becton, Chapel Hill, for defendant appellant.

MOORE, Justice.

Assignments of error Nos. 1, 2, 3, 6, and 7 are not brought forward and argued in defendant's brief, and consequently these assignments are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; State v. Crews, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State* v. *McLean*, 282 N.C. 147, 191 S.E. 2d 598 (1972). However, in view of the gravity of the punishment in this case, we have carefully reviewed these assignments but find them to be without merit.

By his fourth assignment of error defendant asserts that "[t]he trial court erred in its instructions to the jury in that the trial court: (1) misstated the law; (2) expressed opinions to the jury; and (3) inaccurately summarized the evidence and contentions of the State and of the defendant."

Under this assignment defendant first contends that the trial court in discussing premeditation and deliberation expressed an opinion contrary to G.S. § 1–180 that there was no evidence of provocation in the case. That portion of the charge to which defendant points in support of this contention is as follows:

> Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence *of the absence of provocation* and all other circumstances under which the homicide was committed. (Emphasis by defendant.)

This contention is without merit. Concerning premeditation and deliberation, the court stated:

> I have used the word "premeditation" and "deliberation." Those elements must be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from

> circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the inflicting of the fatal wound, or where the evidence shows that the killing is done in a brutal and ferocious manner.
>
> Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence of the absence of provocation and all other circumstances under which the homicide was committed.
>
> In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after and all attending circumstances in determining whether the act shall be attributed to premeditated design or sudden impulse.

Thereafter, the court fully defined premeditation and deliberation. When that portion of the charge to which defendant excepts is viewed in its context, it is apparent that the statement by the court was not an expression of an opinion that there was no evidence of provocation in this case. To the contrary, this instruction was a correct statement of the law in the case and was given by the court, as required by G.S. § 1-180, to assist the jury in reaching a verdict. It is in accord with many well-considered decisions of this Court. See *State* v. *Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State* v. *Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State* v. *DuBoise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State* v. *Hamby* and *State* v. *Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970).

Defendant next contends that the manner in which the court summarized the evidence indicated to the jury that there was no provocation in the case. The paragraph in the charge complained of is as follows:

> The State's evidence tends to show that the defendant got a ride with Dolby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Dolby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon; was with his children or near his children and that he did not do any act or commit any act which would constitute provocation which would reduce the offense to manslaughter and that he did not do any act which would give a person reasonable grounds to believe that he was going to suffer any bodily harm whatsoever and particularly any serious bodily harm from John Griffin.

This recapitulation of the evidence is in substantial accord with the testimony in the case. In reviewing the evidence the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. If there are minor discrepancies, they must be called to the attention of the court in time to afford opportunity for correction, otherwise they are deemed to be waived and will not be considered on appeal. *State* v. *Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973); *State* v. *Tart*, 280 N.C. 172, 184 S.E. 2d 842 (1971); *Northgate Shopping Center* v. *Highway Commission*, 265 N.C. 209, 143 S.E. 2d 244 (1965); 7 Strong, N.C. Index 2d, Trial § 33 (1968). No prejudicial error is shown by this statement. If defendant desired a more comprehensive statement of the evidence on this phase of the case, he should have requested it.

Under this same assignment defendant also contends that the trial court stated the following contention in such a manner that the jury could reasonably infer that this statement was the court's opinion:

> The State contends upon the plea of self-defense that there was no evidence that Griffin was at this time making any assault on the defendant or threatening him with an assault; that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm. * * *

This contention was amply supported by the State's evidence. Again, if defendant had any objection to this contention, he should have stated it at the time. *State* v. *Thomas*, supra; *State* v. *Tart*, supra; *Emanuel* v. *Clewis*, 272 N.C. 505, 158 S.E. 2d 587 (1968); Strong, N.C. Index 2d, Trial § 34 (1968).

Additionally, defendant contends that the manner in which the trial court stated defendant's contentions lends credence to defendant's contention that the trial court gave unequal stress to the contentions for the State. The statement in the charge complained of is as follows: "The defendant's evidence tends to show that sometime after that, he contends a fairly brief

on or about the first of July of this year the defendant, Jesse Thurmon Fowler, did intentionally and without justification or excuse shoot John Griffin with a pistol and thereby proximately caused his death and that Jesse Thurman Fowler then intended to kill John Griffin and that he acted with malice and premeditation and deliberation, if you find all of those facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the first degree.

If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon that charge if you find from the evidence beyond a reasonable doubt that on or about the first of July of 1973, Jesse Fowler did intentionally and with malice shoot John Griffin with a pistol thereby proximately causing his death, then nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree. However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the second degree.

In instructing on manslaughter the court said:

> If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And upon that charge if you find from the evidence beyond a reasonable doubt that he did on the day in question shoot John Griffin proximately causing his death but you are satisfied that he killed him without malice in the heat of sudden passion lawfully aroused by adequate provocation, as I have defined that to you, or if you find—that is, satisfied, not beyond a reasonable doubt but satisfied that although he believed that it was necesary to shoot John Griffin to protect himself, he did not have reasonable ground for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.
>
> If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Griffin and thereby proximately caused his death, if you

time, that he was actually starting to visit a friend and got a ride with Dolby. * * *" Defendant stated that here the court, "as if editorializing," inserted "he contends a fairly brief time." Defendant had testified that approximately thirty minutes had elapsed from the time the deceased jumped on him and broke his nose at the King's Lounge to the time he saw the deceased at Walnut Terrace. The State's evidence was that three to four hours had elapsed. Therefore, the court's statement of defendant's contention was in accord with defendant's evidence and was in fact favorable to him. No prejudice appears.

By assignment of error No. 3 defendant asserts that "[t]he trial court erred by failing to give a full instruction on the circumstances under which the jury could return a verdict of not guilty. * * *" Defendant contends that the charge limited in effect the verdict of not guilty to a finding by the jury that defendant killed the deceased in self-defense, and that under the decisions in *State* v. *Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971), and *State* v. *Ramey*, 273 N.C. 325, 160 S.E. 2d 56 (1968), the court erred in failing to instruct the jury that if the State failed to satisfy it from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree or murder in the second degree or manslaughter, the jury should return a verdict of not guilty.

This assignment and the exceptions on which it is based do not comply with well-established appellate rules. Exceptions Nos. 34 and 35 appear at the end of the charge. Neither identifies by brackets or otherwise any particular portion of the charge to which exception is taken. These exceptions are ineffectual as bases for assignments of error in that they do not point out specific portions of the charge as erroneous. Neither does this assignment quote the portion of the charge to which defendant objects. Too, where the assignment of error is based on failure to charge, it is necessary to set out appellant's contention as to what the court should have charged. *State* v. *Crews*, supra; *State* v. *Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *State* v. *Wilson*, 263 N.C. 533, 139 S.E. 2d 736 (1965). Even though this assignment does not comply with the well-established rules, since a death sentence is involved we have elected to discuss defendant's contention.

The court correctly instructed the jury as to murder in the first degree and murder in the second degree as follows:

> I instruct you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that

> are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe that he was about to suffer death or serious bodily harm at the hands of John Griffin, and under those circumstances he used only such force as reasonably appeared necessary under the circumstances, then he would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty.

In the above-quoted portions of the charge the court, after instructing the jury as to what they must find before returning a verdict of guilty of either murder in the first degree or second degree, concluded the instruction as to each of those offenses as follows: "However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty. . . ." On the charge as to manslaughter no comparable instruction was given to the effect that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant did on the day in question shoot John Griffin thereby proximately causing his death, then the jury should return a verdict of not guilty. As stated by Justice Bobbitt (now Chief Justice) in *State* v. *Ramey*, supra:

> In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State* v. *Redman*, supra. [217 N.C. 483, 8 S.E. 2d 623 (1940)]." *Accord, State* v. *Woods*, supra.

As in *Ramey*, the trial judge in the present case inadvertently failed to give such instruction. This was error. However, in this case it is not such error as to require a new trial.

In *State* v. *Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969), defendant was on trial for murder, and the jury was instructed

that it could return a verdict of guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty. The jury was correctly instructed on the law pertaining to murder in the first degree and murder in the second degree, but an erroneous instruction was given on the charge of manslaughter. The jury returned a verdict of guilty of murder in the first degree. In finding no error in the trial Justice Sharp, for the Court, stated:

> Erroneous though the challenged instruction was, it does not entitle defendant to a new trial for, demonstrably, it was harmless. First, the verdict of murder in the first degree established that defendant had unlawfully killed Sawyer with malice, premeditation, and deliberation. *State* v. *Moore*, 275 N.C. 198, 166 S.E. 2d 652. Defendant assigns no error in the charge as it related to murder in the first or second degree. * * * Ordinarily, when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. In such event it cannot be known whether the verdict would have been manslaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter was harmless. In *State* v. *Munn*, 134 N.C. 680, 47 SE 15, the jury found "that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately, and with premeditation, and was guilty of murder in the first degree. The State (had) thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the (intentional) killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error."

Similarly, in the present case when the jury became convinced beyond a reasonable doubt that defendant, after deciding to take Griffin's life, intentionally and unlawfully shot and killed him, the error in the charge below murder in the second degree was immaterial error. This assignment is overruled.

By assignment of error No. 5 defendant also contends the trial court erred in failing to instruct the jury as to the law on intoxication as it relates to the facts in this case. Again, the assignment does not set out what the court should have charged. See *State* v. *Crews*, supra. We have, however, considered defendant's contention.

Voluntary intoxication is not a legal excuse for crime. *State* v. *Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973); *State* v. *Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). Although it is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent *State* v. *Propst*, supra. If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, and essential element of murder in the first degree is absent. *State* v. *Bunn*, supra. In such a situation it is said that " 'the grade of offense is reduced to murder in the second degree.' " *State* v. *English*, 164 N.C. 497, 511, 80 S.E. 72, 77 (1913).

While there was evidence that defendant was drinking, there was no evidence that he was drunk or intoxicated except defendant's exculpatory statement to Detective Williams. All the State's witnesses who saw him at the time of the shooting or when he made his statement to Detective Williams testified that defendant appeared to be in complete control of his mental and physical faculties and was not intoxicated or drunk. None of defendant's numerous witnesses who saw him testified that he was drunk at anytime during the day on Sunday, July 1, up to and including the time of the shooting, or after the shooting until defendant surrendered to the police. Defendant testified in his own behalf and recited in minute detail his activities on Saturday, June 30, and Sunday, July 1. At no time in his testimony did he state that he was intoxicated or that his mind was in any manner impaired or affected by anything he had had to drink. His only defense was self-defense, and he did not request any instruction on intoxication as a defense to first degree murder. We hold, therefore, that there was not sufficient evidence of intoxication in this case to require an instruction as to the law on intoxication as a defense to murder in the first degree. See *State* v. *Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State* v. *Hamby* and *State* v. *Chandler*, supra; *State* v. *Bunton*, 247 N.C. 510, 101 S.E. 2d 454 (1958).

Apparently in an attempt to simplify matters on appeal, the State and defense counsel entered into the following stipulation:

> [We] hereby stipulate and agree that upon the voir dire of the jury the following transpired at the trial of this matter.
>
> 1. That the jury voir dire was not transcribed.
>
> 2. That the State questioned the prospective jurors with regard to their attitudes about the death penalty and advised them that death would be the penalty as a result of a first degree murder verdict.
>
> 3. That two jurors were excused for cause because of their views on capital punishment.

Now defendant, under his eighth assignment of error, asserts that the death qualification of the jury wherein the jury was advised that death would be the penalty upon a first degree murder verdict, the exclusion of death-scrupled jurors from appellant's jury and the failure of the trial court to have the jury *voir dire* transcribed violated appellant's Sixth Amendment right to a jury that reflects a fair and representative cross section of the community.

Defendant first contends under this assignment that the Sixth Amendment to the United States Constitution mandates that no venireman be excluded for cause because of his views on the death penalty, regardless of what his views may be. Therefore, defendant argues, the trial court committed error in permitting the veniremen to be questioned about their beliefs on capital punishment and in allowing the State to advise the prospective jurors that death is the penalty in a first degree murder conviction.

The Supreme Court of the United States in *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), decided otherwise. In *Witherspoon* the United States Supreme Court held that the sentence of death may not be carried out if the jury that imposed it was chosen by excluding veniremen for cause simply because they had general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. But in footnote 21 of that opinion it is stated:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen

> who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Since *Witherspoon* this Court has consistently held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. *State* v. *Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State* v. *Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972); *State* v. *Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972); *State* v. *Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State* v. *Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State* v. *Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971); *State* v. *Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969).

Under these decisions it is permissible to ask a prospective juror about his beliefs on capital punishment in order that the State, as well as the defendant, may have a trial by an impartial jury. To achieve this impartial jury the State is allowed to challenge for cause any juror who would automatically vote against a verdict that would require the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case, or whose attitude towards the death penalty would prevent him from making an impartial decision as to defendant's guilt. As stated by this Court in State v. Doss, supra, "a venireman should be willing to consider all the penalties provided by State law and he should not be irreparably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding." See also *State* v. *Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967). Justice Higgins in *State* v. *Spence*, 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968), stated the reason for challenge as follows:

> According to the Federal Court decisions 'the function of challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.' The purpose of challenge should be to guarantee 'not only the freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held.' *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759; *Turberville* v. *United States*, 112 U.S.App.D.C. 400, 303 F. 2d 411 (cert. den. 370 U.S. 946); *Logan* v. *United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; *Hayes* v. *Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578.

We hold that in a capital case it is proper to inquire into a prospective juror's views on capital punishment in order to determine his competency to serve in an impartial manner. See *State* v. *Crowder*, N.C. 203 S.E. 2d 38 (1974).

Under this same assignment of error defendant also contends that the trial court erred in not ordering the court reporter to transcribe the jury *voir dire*, and that such failure requires that defendant's death sentence be vacated. In making this contention, defense counsel in his brief points to the stipulation entered into with the State whereby it was stipulated that the jury *voir dire* was not transcribed and that two jurors were excused for cause because of their views on capital punishment.

> A stipulation is a judicial admission. [Citations omitted.] It has been said in North Carolina that courts look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties. [Citations omitted.]
>
> * * * * *
>
> * * * "[S]tipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished. * * *" 36 Cyc. 1291, 1292. * * * *Rickert* v. *Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972).
>
> * * * "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision. * * *" *State* v. *Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). On its face the stipulation in the present case is not definite and

certain. The stipulation only notes that two jurors were excused for cause "because of their views on capital punishment," but does not reveal whether the State or defendant moved for their exclusion or what their views on capital punishment might have been. As defense counsel in his brief states:

"No stipulation or admission based on recollection can reflect the many possible answers given in response to the death-qualifying questions. No reflection now can show this Court how resolute or irresolute an answer may have been. Did either of the excused jurors voice general objections to the death penalty or express conscientious or religious scruples against its infliction? Was an excused juror's response ambiguous? Was one of the jurors excused because he said that he could not vote for the death penalty in this particular case? We do not know the answer to these questions; there is no transcript."

In effect it is now defendant's position that the stipulation entered into by defense counsel and the State is insufficient in that it does not provide this Court with an adequate basis for determining whether the two jurors allegedly excused for cause because of their views on capital punishment were properly excused under *Witherspoon* and the decisions of this Court cited above, and furthermore that it was error for the trial court not to order the *voir dire* examination of the jurors transcribed. We agree that the stipulation was deficient as contended by defendant. In order to determine whether the two jurors were in fact properly excused, this Court *ex mero motu* ordered that the court reporter's record of the *voir dire* examination as to all jurors in this case be transcribed and certified by the trial court to this Court, and that such transcript be made a part of the case on appeal. This was done. See Rule 19, Rules of Practice in the Supreme Court.

This sixty-five page transcript discloses that, contrary to the stipulation, no prospective juror was excused for cause by reason of his views on capital punishment. Although two prospective jurors who expressed some reservation as to capital punishment were excused, they were not excused for cause but were excused peremptorily by the State. Including these two peremptory challenges the State utilized seven of its permissible nine peremptory challenges, and defendant seven of his permissible fourteen. See G.S. § 9-21. Peremptory challenges are challenges that may be made according to the judgment

of the party entitled thereto, and the reason for challenging a juror peremptorily cannot be inquired into. *State* v. *Noell*, supra; *State* v. *Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969).

It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State* v. *Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State* v. *Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. § 15-180; G.S. § 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercase. *State* v. *Fox*, supra. If, as in the present case, defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

Since the complete record now before us discloses that no juror was excused by the State for cause due to his view on capital punishment, defendant's contention that the trial court erred in excusing jurors for cause is overruled, and his contention as to the failure of the trial court to order a transcript of the *voir dire* examination to be included in the case on appeal is no longer tenable.

Defendant by his final assignment of error contends that the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 19, 24, and 27 of the Constitution of North Carolina. He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

Defendant also adopts and incorporates by reference the contentions and citations of authority contained in the brief filed in *State* v. *Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), by the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae*, and the brief filed in *State* v. *Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973), by the North Carolina Civil Liberties Union

Legal Foundation Inc., as *amicus curiae*. Suffice it to say that the arguments advanced in this case were fully discussed and rejected in the opinions filed in those cases. Further discussion would serve no useful purpose.

In *State* v. *Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), this Court declared that the death penalty is the sole and exclusive punishment for murder in the first degree committed in North Carolina after 18 January 1973. G.S. § 14–17. The murder for which this defendant has been convicted was committed on 1 July 1973. The death sentence, therefore, was not only proper but was the only one that the trial court could impose.

An examination of the entire record discloses that defendant has had a fair trial free from prejudicial error. The judgment imposd must therefore be upheld.

No Error.

Chief Justice Bobbitt, Justice Higgins and Justice Sharp dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State* v. *Jarrette*, 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974).

Judgment, Supreme Court of North Carolina

Spring Term, 1974—No. 34—Wake County

State of North Carolina *v.* Jesse Thurman Fowler

This cause came on to be argued upon the transcript of the record from the Superior Court, Wake County: upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Dan K. Moore, Justice, be certified to the said Superior Court, to the intent that proceedings be had therein in said cause according to law, as declared in said opinion.

It is considered and adjudged further that the defendant and surety to the appeal bond, U.S. Fidelity & Guaranty Co., do pay the costs of the appeal in this Court incurred, to wit, the sum of forty seven and no one hundredths dollars ($47.00) and execution issue therefore.

Certified to Superior Court, this 22 day of April, 1974.

Adrian J. Newton,
Clerk of Supreme Court.

(S) By FS,
Deputy Clerk.

In the Supreme Court of the United States

No. 73–7031

Jesse Thurman Fowler, petitioner

v.

North Carolina

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is herby, granted.

October 29, 1974.

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